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IN THE

Supreme Court of the United States

October Term, 1965

No. 49

EDWARD MISHKIN,
Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Appellee.

BRIEF FOR APPELLEE

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Indiana University Institute for Sex Research, Sexual Behavior of the Human Female 49

Kalvan, The Metaphysics of the Law of Obscenity, 1 Supreme Court Review (1960) 63

Lockhart and McClure, Obscenity: The Developing Constitutional Standard, 45 Minn. L. Rev. 5 (1960) 46, 47

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BRIEF FOR APPELLEE

Opinions Below

The opinion of the trial court is reported at 26 Misc. 2d 152 (R. 720-8).* The opinion of the Appellate Division, concerned however with an aspect of the case not presented on this appeal, is reported at 17 App. Div. 2d 243 (1st Dept. 1962). The affirmance of the Court of Appeals, without opinion, is reported at 15 N. Y. 2d 671 (1964).

* References, unless otherwise indicated, are to the printed pages of the trial record.

Questions Presented

1. Are the exhibits published and possessed by the appellant obscene under applicable constitutional principles?
2. Is material which appeals to the prurient interests of sexual deviants, rather than the "average man," obscene within the meaning of the *Roth* formulation?
3. Is Section 1141 of the New York Penal Law unconstitutional for vagueness of the terms "obscene," "sadistic," and "masochistic"?
4. Does the constitutional requirement of scienter include knowledge that the materials in question are obscene under the law?
5. Is material lawfully seized under the Fourth Amendment when it is acquired with the consent of an accomplice in actual physical possession and control?
6. Is a seizure from a store of books offered for sale to the public constitutional when made incident to an arrest for their possession, but without a prior adversary hearing as to their obscenity?

The Statute Involved

"Section 1141. Obscene Prints and Articles

"1. A person who sells, lends, gives away, distributes, shows or transmutes, or offers to sell, lend, give away, distribute, show or transmute, or has in his possession with intent to sell, lend, distribute, give away, show or transmute, or advertise in any manner,

or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book, magazine, pamphlet, newspaper, story paper, writing, paper, card, phonograph record, picture, drawing, photograph, motion picture film, figure, image, phonograph record or wire or tape recording, or any written, printed or recorded matter of an indecent character which may or may not require mechanical or other means to be transmuted into auditory, visual or sensory representations of such character; or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose, or who designs, copies, draws, photographs, poses for, prints, utters, publishes, or in any manner manufactures, or prepares any such book, picture, drawing, photograph, motion picture film magazine, pamphlet, newspaper, story, writing, paper, card, phonograph record, figure, image recording, matter, article or thing, or who writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting so to do, where, how, of whom, or by what means any, or what purports to be any, obscene, lewd, lascivious filthy, disgusting or indecent books, picture, photograph, motion picture film, writing, paper, card, phonograph record, figure, image, recording, matter, article or thing, named in this section can be purchased, obtained or had or who has in his possession, any slot machine, motion picture projector or other mechanical contrivance with moving pictures of nude or partly denuded female figures which pictures are lewd, obscene, indecent or immoral, or other lewd, obscene, indecent or immoral drawings, image, recording, article or object, or who shows, advertises, exhibits or transmutes

the same, or causes the same to be shown, advertised, exhibited or transmuted, or who buys, owns or holds any such machine with the intent to show, advertise, transmute, or in any manner exhibit the same; provided, that this subdivision shall not apply to motion picture films licensed by the state department of education; or who

"2. In any manner, hires, employs, uses or permits any person to do or assist in doing any act or thing mentioned in this section, or any of them,

"Is guilty of a misdemeanor, * * *

"4. The possession by any person of six or more identical or similar articles coming within the provisions of subdivision one of this section is presumptive evidence of a violation of this section.

"5. The publication for sale of any book, magazine or pamphlet designed, composed or illustrated as a whole to appeal to and commercially exploit prurient interest by combining covers, pictures, drawings, illustrations, caricatures, cartoons, words, stories and advertisements or any combination or combinations thereof devoted to the description, portrayal or deliberate suggestion of illicit sex, including adultery, prostitution, fornication, sexual crime and sexual perversion or to the exploitation of sex and nudity by the presentation of nude or partially nude female figures, posed, photographed or otherwise presented in a manner calculated to provoke or incite prurient interest, or any combination or combinations thereof, shall be a violation of this section."

Statement

On March 8, 1960, the District Attorney of New York County, pursuant to the direction of a grand jury, filed in the Court of Special Sessions of the City of New York, County of New York, a one hundred ninety-eight count information against the defendant (R. 3-119).

The first sixty-two counts charged the defendant with possessing obscene books with intent to sell (Penal Law, §1141), counts 63 through 110 charged unlawfully publishing obscene books (*ibid.*), counts 111 to 159 charged unlawfully hiring others to prepare obscene books (*ibid.*), and counts 160-198 charged failing to print the publisher's and printer's name and address (Gen. Bus. Law, §330). Seventy-two books formed the basis upon which the various counts were predicated.

At the commencement of the trial, counts 33 through 36, as well as counts 54, 55, 62, 94, 105, 143, 154, 191 and 195 were dismissed on motion of the district attorney (R. 120).

On December 14, 1960, after trial in the Court of Special Sessions of the City of New York, County of New York (Gassman, Breslin, and Galloway, JJ.), Mishkin was found guilty of one hundred and seventy-three of the remaining counts: fifty-four crimes of Unlawfully Possessing Obscene Books With Intent to Sell (Penal Law, §1141); forty-three crimes of Unlawfully Publishing Obscene Books (*ibid.*); forty-three crimes of Hiring Others to Prepare Obscene Books (*ibid.*); and thirty-three crimes of Failing to Print Publisher's and Print-

ER'S NAME AND ADDRESS (Gen. Bus. Law, §330) (R. 121-2, R. 699-700, R. 718-19). The defendant was sentenced to serve penitentiary terms aggregating three years, and, in addition, fines totalling twelve thousand five hundred dollars were imposed (R. 121-2, R. 718-19).

On Appeal, the Appellate Division, First Department, modified the judgment by dismissing the counts based on a violation of the General Business Law [*People* v. *Mishkin*, 17 App. Div. 2d 243 (1962)], and affirmed the judgment with respect to the remaining one hundred and forty counts. The Court of Appeals affirmed the order of the Appellate Division [15 N. Y. 2d 671 (1964)].

In the following chart, extracted from Court's Exhibit A, there is set forth a schedule of the books with the relevant counts in the information upon which the defendant presently stands convicted.

TITLES OF EXHIBITS FOUND OBSCENE AND COUNTS IN INFORMATION COVERING EACH OF THE EXHIBITS

Exhibit	*TITLE*	COUNTS IN INFORMATION		
		Possession	*Publishing*	*Hiring Others*
1	Chances Go Around	1	63	111
2	Impact	2	64	112
3	Female Sultan	3	65	113
4	Satin Satellite	4		
5	Her Highness	5	67	115
6	Mistress of Leather	6	68	116
7	Educating Edna	7	69	117
8	Strange Passions	8	70	118
9	The Whipping Chorus Girls	9	71	119
10	Order Of The Day and Bound Maritally	10	72	120
11	Dance With the Dominant Whip	11	73	121
12	Cult Of The Spankers	12	74	122
13	Confessions	13	75	123
14 & 46	The Hours Of Torture	14 & 40	76	124
15 & 47	Bound In Rubber	15 & 41	77	125
16 & 48	Arduous Figure Training at Bondhaven	16 & 42	78	126
17 & 49	Return Visit To Fetterland	17 & 43	79	127
18	Fearful Ordeal In Restraintland	18	80	128
19 & 50	Women In Distress	19 & 44	81	129
20 & 54	Pleasure Parade No. 1	20 & 48	82	130
21 & 57	Screaming Flesh	21 & 51	86	134
22 & 58	Fury	22 & 52		
23	So Firm So Fully Packed	23	87	135
24	I'll Try Anything Twice	24		

Exhibit	*TITLE*	COUNTS IN INFORMATION		
		Possession	*Publishing*	*Hiring Others*
25 & 59	Masque	25 & 53		
26	Catanis	26		
27	The Violated Wrestler	27	89	137
28	Betrayal	28		
29	Swish Bottom	29	90	138
30	Raw Dames	30	91	139
31	The Strap Returns	31	92	140
32	Dangerous Years	32	93	141
43	Columns of Agony	37	95	144
44	The Tainted Pleasure	38	96	145
45	Intense Desire	39	97	146
51	Pleasure Parade No. 4	45	85	133
52	Pleasure Parade No. 3	46	84	132
53	Pleasure Parade No. 2	47	83	131
55	Sorority Girls Stringent Initiation	49	98	147
56	Terror At The Bizarre Museum	50	99	148
60	Temptation	57		
61	Peggy's Distress On Planet Venus	58	101	150
62	Ways of Discipline	59	102	151
63	Mrs. Tyrant's Finishing School	60	103	152
64	Perilous Assignment	61	104	153
68	Bondage Correspondence		107	156
69	Woman Impelled		106	155
70	Eye Witness		108	157
71	Stud Broad		109	158
72	Queen Bee		110	159

The Evidence

A. The Exhibits

The books in evidence consist of fifty different titles. The probative force of the exhibits is twofold. An analysis of the apparent characteristics of the material is pertinent to a finding of scienter. The contents of the exhibits, of course, are the substance of the crime charged.

The Covers

The jackets and backing of most of the exhibits have illustrations which relate to the subject matter of the book. The covers of about nineteen of the books display women being whipped, beaten, tortured or abused (Exhs. 3, 4, 8, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 31, 51, 52, 53, 55, 56). Practically all the book jackets depict symbols associated with fetishism (Exhs. 7, 9, 24, 45, 53 do not). One jacket depicts a lesbian seduction scene (Exh. 71, *Stud Broad*). Numerous exhibits display partially clothed or nude women whose breasts and buttocks are greatly exaggerated (see e.g., 2, 5, 12, 13, 23, 25, 26, 29, 46, 49, 55, 69, 71, 72). In addition to the illustrations, the book jackets also reflect the titles in large print. A few of the more colorful titles are: *Screaming Flesh* (Exhs. 21 & 57), *The Dance with the Dominant Whip* (Exh. 11), *Cult of the Spankers* (Exh. 12), *Bound in Leather* (Exh. 47), *Fearful Ordeal in Restraintland* (Exh. 18) and *The Strap Returns* (Exh. 31).

It is noted that some of the books have been printed in foreign countries (Exhs. 11, 12) and are restricted to a limited group of subscribers (Exhs. 1, 3, 5, 6, 8, 13, 29, 57). Typical cover blurbs are: "For Sophisticated Collectors

of the Unusual," and "a novel of bondage," "The Story of the Creation of a Lesbian" and "The Unusual Story of a Woman Flagellant" (Exhs. 8, 29, 57, 71).

Although all of the books are paper-bound "pulps," most of the exhibits are marked to sell at exorbitant prices [see *e.g., Confession* (Exh. 13, 127 pp. at $15.00); *Chances Go Round* (Exh. 1, 50 pp. at $10.00); *Female Sultan* (Exh. 3, 150 pp. at $10.00)]. Fifteen other books sell for either four or five dollars and all contain less than one hundred and sixty pages (Exhs. 2, 4, 25, 26, 27, 28, 29, 30, 57, 60, 69, 70, 71, 72, 73).

The Contents

The contents of this material are not easily categorized. The dominant theme of the matter is obvious. Subordinate themes, however, run across classification lines and indicate that the subject has multiple sexual elements interwoven. These elements may be roughly denominated as dealing with sado-masochism, fetishism, homosexuality and miscellaneous other sexual aberrations.

A large group of the exhibits may be denominated bondage or sado-masochistic books [Exhs. 3, 14, 15, 16, 17, 18, 19, 20, 21, 51, 52, 53, 55, 56, 61, 62, 63, 64, 68]. This group of exhibits is predominantly devoted to depicting pictorially and verbally innumerable scenes in which individuals are being tortured in varied and fantastic ways. In these sado-masochistic scenes, the victims of the many and varied atrocities are usually referred to as being in bondage or slavery. The victims, moreover, although portrayed in agony, experience pleasure. Sexual fetishism is also

prevalent, being represented, for instance, by "spike" type heels, leather boots, excessively tight clothing, black gloves, whips, masks and corsets.

The "spanking" exhibits involve mistreatment of the victims which is slightly less destructive (Exhs. 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 43, 44, 45). However, these exhibits all deal in great detail with whippings, beatings and spankings. Some are illustrated with pictures of the various punishments and the devices utilized. Others are more concerned with the incidents of sexual seduction, transvestism and fetishism which are liberally interspersed throughout the sado-masochistic "chastisements."

The final group of exhibits present multiple and particularized incidents of sexual seduction (homosexual and heterosexual), sodomy, rape, and masturbation [Exhs. 2, 3, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 60, 69, 70, 71, 72].

B. The Trial

The People's Case

Seizure of the Books and Procurement of Drawings Reproduced Therein

Inspector **George Plansker** of the First Deputy Commissioner's Office of the New York City Police Department testified that, at about 1:00 p.m. on January 12, 1960, while on active police duty, he and five other police officers proceeded to the basement of a loft building located at 37 West 20th Street, New York County, to execute a search warrant (R. 133-4).

In the basement, the inspector observed, in addition to an oil burner, a "large room—a bunker" twenty-five feet by thirty feet, twelve feet in height and enclosed by brick except for one opening—thirty inches by thirty inches—which had a metal door (R. 134, 136-7).

Opening the metal door, the inspector saw a quantity of books and magazines and seized them (R. 134). The process of removing the books encompassed the better part of two days, the room being secured in the inspector's absence by uniformed police officers (R. 137). As the books were removed by the inspector's subordinates, several lieutenants noted the various titles with the number of each. The books were then wrapped and sealed in cartons (R. 136).

At this point in his testimony, the inspector stated that Exhibits 1 through 42, inclusive, were among the books seized on those days (R. 137-8). He further testified concerning the number of each title seized—which in many instances numbered in the hundreds (R. 139-43).

Prior to these events, Inspector Plansker further testified, at approximately 12:30 p.m., on December 29, 1959, he and four officers entered The Publishers Outlet Store, a bookstore located at 250 West 42nd Street, New York County (R. 143-4). The inspector described the premises as a "large store with numerous shelves and racks displaying books and magazines." Between the time of entry and 4:00 p.m., the officers seized a quantity of books and magazines (R. 144). The inspector identified Exhibits 43 through 67 as some of the books obtained at that time (R. 144-50). On cross-examination the inspector noted that

one Cosky and two others were arrested by him in Publishers Outlet that day (R. 156-7).

Also on the same date—December 29, 1959—the inspector and his officers entered Midget Book Shop located at 228 West 42nd Street, New York County (R. 150). The shop was "a small store containing shelves and racks upon which were displayed books and magazines" (R. 150). The officers there seized a quantity of books and magazines among which was included Exhibit 68 (R. 151).

In connection with the events in the Midget Book Store, Inspector Plansker testified that, after he had been in the shop about a half-hour, Mishkin opened the door of the store (R. 151-2). At this point, a Mr. Schenkman, who was in charge of the store and under arrest at the time, went to the door and spoke to the defendant (R. 153, 160). Concluding the conversation, Schenkman then spoke to the inspector (R. 152). After that, the inspector left the store and looked for Mishkin on 42nd Street. The inspector found him inside the book shop, Publishers Outlet (R. 152). The defendant made no statement to the inspector or to other officers relating to the property found in the Midget Book Store or in Publishers Outlet (R. 152).

Approximately two months later, at about 12:45 p.m., on February 10th, 1960, the inspector entered The Main Stem Book Store, 1607 Broadway, New York County, which the inspector described similarly to the other stores (R. 153). There, the inspector procured books among which were Exhibits 69 through 71 (R. 154-5).

On cross-examination, Inspector Plansker testified that he had had the building located at 37 West 20th Street

under observation for several weeks prior to the seizure of the books in the basement on January 12, 1960, and that Levenberg, a printer in the building, had used the bunker room in the basement as a storeroom (R. 157-160). Likewise, the inspector had had Publishers Outlet under observation for several weeks prior to his entry on December 29, 1959 (R. 159).

Detective **Edward Gurnewald** of the Police Commissioner's Confidential Investigating Unit, of the New York City Police Department, testified that, while on active police duty on December 30, 1958, he entered the Publishers Outlet Store, 254 West 42nd Street (R. 163). Inside the store, the officer, upon observing copies of a book entitled *Queen Bee* (Exh. 72), purchased a copy and arrested one Herman Schenkman (R. 164, 165-6). The officer then seized twenty-two more copies of the book (Exh. 72) which were on display (R. 164).

Detective **Herbert C. Hurley** of the New York City Police Department, assigned to the New York County District Attorney's Office, testified that, at 3:30 p.m., on January 22, 1960, he had a meeting with Mr. Louis N. Field, an attorney representing Norman Levenberg, in Room Number 707 at 220 West 42nd Street (R. 166-7). After the detective had a conversation with the attorney, the latter made a telephone call. Concluding the telephone call, the attorney handed the detective a shopping bag containing a series of artist's sketches (Exhs. 1A-L, 4A, 21A, 23A and B, 24A, 25A and B, 26A, 28A, 29A, 30A, 34A, 37A, 60A, 70A, 71A, 72A) as well as three slips of paper (Exhs. 73A, B and C) (R. 167-172).

Preparation of the Books

Hyman Rosen, a writer for twenty years, testified that he had known the defendant since 1954 (R. 395). The witness identified Exhibit 24 as a book which he wrote under the pseudonym "John Thomas" for the defendant at Mishkin's request in 1957 (R. 395-6). Relative to the preparation of the book, the defendant had told Rosen to "spice it up and bring it in" (R. 396). The defendant paid the witness either one or two hundred dollars in cash for the book at the former's store—"Outlet"—on 42nd Street (R. 397).

Exhibits 35 and 36 (Exhibit 65 being an additional copy of 36) were written by the witness for himself as publisher in 1954 (R. 397-8). In September 1957, Rosen sold both books to Mishkin for four hundred dollars in cash, each at Publishers Outlet on West 42nd Street (R. 398-9). The witness utilized the pseudonym "Colin Ross" in writing the books (R. 399).

Acknowledging that he also used the pseudonym "Harry Roskolenko," Rosen identified Exhibit 74 as a contract entered into between Mishkin and himself (R. 399-401). The defendant's signature thereon was executed by Mishkin in the presence of the witness; the latter signed it using the name "Harry Roskolenko" (R. 400-1).

The contract, dated September 3, 1957, stated that the witness had sold for four hundred dollars his novel about Indo China to the defendant (Exh. 74). It stipulated that the witness' name "Harry Roskolenko" would not appear as author, but that the pseudonym "Colin Ross" would be

used instead. It further stated that the title of the novel would be one of several listed names (R. 400-1)—one which, in fact, is the title of Exhibits 35 and 36.

Leotha Hackshaw, a writer, testified that she had known Mishkin for approximately three or four years (R. 407-9).

The witness identified Exhibit 26 as a book she had written for the defendant "around the Fall of '57" (R. 408-9). Relative to the preparation of the book, Mishkin told the witness that he wanted a book "full of sex scenes and lesbian scenes * * * the sex had to be very strong, it had to be rough, it had to be clearly spelled out * * * I had to write sex very bluntly, make the sex scenes very strong * * * the sex scenes had to be unusual sex scenes between men and women, and women and women, and men and men * * * he [Mishkin] wanted scenes in which women were making love with women * * * he wanted sex scenes in which they [*sic*] were lesbian scenes. He didn't call it lesbian, but he described women making love to women and men were making love to men, and they [*sic*] were spankings and scenes—sex in an abnormal and irregular fashion" (R. 409-412).

Upon completion of Exhibit 26, the defendant paid the witness two hundred dollars in cash at "the store"—Publishers Outlet on 42nd Street and 8th Avenue (R. 412, 413).

In the fall of 1958, the witness wrote Exhibit 25 (Exhibit 59 is a second copy) for the defendant at his request (R. 413, 414, 415). Concerning this book, Mishkin "wanted

an emphasis on beatings and fetishism and clothing—irregular clothing, and that sort of thing, and again sex scenes between women; always sex scenes had to be very strong" (R. 414).

In writing these books, the witness utilized books given her by the defendant (R. 417).

Finally, the witness noted that, when she wrote books for the defendant, she used the name "Shaw Lee" (R. 415).

Kenneth Johnson, a writer for ten years, testified that he had known Mishkin since April of 1955 (R. 425-6).

The witness stated that he had written Exhibits 1, 2, 3, 5, 21 (Exhibit 57 is a second copy), 22 (Exhibit 58 is a second copy), 23, 27, 28, 29, 30, 32, 33, 34, 39 (Exhibit 67 is a second copy), 43, 44, 60, 69, 70, 71, and 72 for the defendant at his request (R. 427-449). Further, the witness gave the dates when he wrote the various books an dthe price paid by Mishkin in cash for each one (*ibid.*).

Johnson wrote some of the books for the defendant under the name "Justin Kent," but he used the name "Stan Reeves" at least once (R. 428, 429, 432, 439, 443). And, the defendant paid him for the books either at the Main Stem Book Store (R. 427, 435, 438, 441, 444) or at the store at 254 West 42nd Street (R. 427, 433, 437, 439, 448).

When the defendant asked the witness to write Exhibit 3, Mishkin advised Johnson that "[h]e wanted the female to be the dominant person in the story" (R. 433).

Relative to Exhibit 5 Mishkin gave the witness "an unbound book that he wanted me to extend * * * He wanted me to deal graphically with the implementation [*sic*] of wheels [*sic*, probably "weals"] on a female's body, of the darkening of flesh under flagellation; and he said that the people who read these kinds of books didn't care particularly about sex. He wanted me to concentrate mostly on the changing of the color of flesh when people were being flagellated, and he didn't wan tany blood in it" (R. 434).

Concerning Exhibit 22 (Exhibit 58 is a second copy), Mishkin "wanted * * * [it] to have a strong lesbian theme * * *" (R. 436).

As to Exhibit 43, Mishkin "told me practically the same thing that he had told me about the other books that he wanted on flagellation, not too much sex, that the people were more—the people who buy this book were more interested in the reddening of flesh and in no blood being let because he wanted not too much violence and in—in wheels [*sic*] appearing on the bodies of the victims because this is what the people who bought these books wanted" (R. 446).

On cross-examination the witness identified Exhibit A, produced by defense counsel, as a research paper on pornography written by him for the defendant (R. 463-66, 476).

Ernest Stanton, an artist, testified that he had known Mishkin since 1955 or 1956 (R. 477-8). The witness advised that he had executed Exhibits 1A through L, 21A, 23A and B, 25A and B, 30A, 37A and 71A—all drawings—

for the defendant at the latter's request (R. 478-82). Prior to executing the drawings, the witness could recall examining only one manuscript (Exh. 1) in connection with one set of drawings (Exh. 1A-L); he had been made aware by Mishkin that all the drawings were to be used to illustrate books or covers (R. 476-9, 482).

Stanton also drew the pictures which were reproduced in Exhibits 2, 3, 5, 27 and 69 (R. 487-9).

In further testimony, Stanton gave the times when he made the drawings and the price paid in cash by the defendant for each drawing (R. 478-89). These transactions took place, according to the witness, at Publishers Outlet, 254 West 42nd Street (*ibid.*).

Gene Bilbrew, an artist, testified that he had known the defendant since 1954 or 1955; that he had drawn for Mishkin at his request, Exhibits 4-A, 24-A, 26-A, 28-A, 29-A, 60-A, 70-A, and 72-A (all drawings), and that he had made the drawings appearing on Exhibits 22, 35, 36, and 70 (R. 530-537). The witness also stated in detail the dates when he executed the drawings and the amounts paid him in cash by the defendant for them (*ibid.*). The witness was paid by Mishkin, in all but one instance, "at the book store"—Publishers Outlet (R. 531, 533, 534, 535, 535, 536, 536, 537). Once, the defendant paid him at the Main Stem Book Store, 49th Street and Broadway (R. 535).

Production and Distribution of the Books

Norman Levenberg, a photo offset printer, testified that he had known the defendant for approximately twelve years, that he had done printing for the defendant, and that all but three of the books (Exhs. 31-33)—Exhibits 1 through 72—had been printed by him for Mishkin (R. 173-5).

At the time of his testimony [October 24, 1960 (R. 124)], the witness' place of business was at 125 West 21st Street (R. 176). From September, 1957, to May, 1959, his business was located at 37 West 20th Street, and from May, 1959 to January, 1960, it had been at 250 West 49th Street (R. 176-178). Sometime thereafter Levenberg moved to the 21st Street address (*ibid.*). At various times, the witness did business under the names "Norman Offset" and "Marsee Offset" (R. 176).

In connection, Levenberg noted "when I printed up these books I was at 37 West 20th Street; a few of these books, I was at 250 West 49th Street" (R. 176).

The arrangements, according to the witness, relative to his printing the books for Mishkin at the latter's request were the same in each instance (R. 178). The defendant would call the witness and ask him "to come down to his store, that he had a job he wanted me to do" (R. 178-9). Usually, the store in each instance was Publishers Outlet, 254 West 42nd Street, which Mishkin referred to as "my store" (R. 179).

Answering the defendant's call, Levenberg went to the defendant's store and there received from Mishkin "ei-

ther a manuscript or * * * a previously printed book" (R. 179). In the instance of a typewritten manuscript, the witness gave it to a typesetter—either Dorothy Yeeto of Cold Type or Virginia Admerl of Academy Typing Service —who set the type up "in the same size pages that I was going to print it in" (R. 179, 253). When Levenberg received the material back from the typesetter, he photographed the material, then he stripped up "the negatives into book form, print them on the press on flat sheets; and then I would give it to a binder [—either York Bindery or Hudson Bindery—] who would make it up into a book" (R. 180, 253). When Mishkin gave Levenberg an already printed book, the witness "didn't have to bother with the typesetter. All I would do is pull the book apart and photograph it and go through the same procedure" (R. 180).

Further, if the matter to be printed were a manuscript, Mishkin would state the price to be placed on the cover and would also "give me a picture for the cover" (R. 180, 182-3). If the manuscript were "thin," the witness, following the defendant's instructions, would utilize certain techniques to make the finished product "a little thicker" (R. 180-1).

In addition, Mishkin instructed the witness to put a publisher's name and address on the book because "It's got to have a publisher's name on there" (R. 181). At no time, however, did Mishkin ever instruct the witness to indicate the publisher as the defendant or as Publishers Outlet (R. 182). Nor did the defendant ever direct Levenberg to indicate the publisher as any corporation, firm

or name associated with the defendant (R. 182). In fact, Mishkin instructed the witness to "[m]ake up any name and address" (R. 181).

Upon completion of the printing, Levenberg—during the period March 9th, 1958 to March 9th, 1960—took some of the books "to what store he [the defendant] was in at the time"; in fact, he took fifty copies to Publishers Outlet and a like number to the Midget Book Shop (R. 182, 344). The balance of the books were placed in a "warehouse" (R. 182).

The defendant "almost always" paid the printer in cash either in "the store" or in the bar next to the store (R. 192). The price paid by the defendant for each book was usually forty cents—although, if it were a "thin" one, the price was fifteen or twenty cents (R. 192, 193). The number of books ordered by Mishkin varied from a thousand copies to five thousand (R. 192-3). For a printing job, the witness at times got paid a thousand dollars in cash by the defendant (R. 193).

Levenberg also stated that, at times, he shipped—pursuant to the defendant's orders—some of the books to cities out of the state (R. 254).

The first warehouse utilized for storing the books printed by the witness for Mishkin was in the basement of 44 West 17th Street (R. 182). In the middle of 1958, Levenberg moved the books to Room 908 of 37 West 20th Street—the building where he had his shop at the time—because the storage facilities at 17th Street "had rodents in it" (R. 184-5, 187). In November, 1959, the

witness moved the books from Room 908 of 37 West 20th Street to the basement of the building (R. 187).

In connection with the moving of November, 1959, Levenberg declared that the defendant had told him about that time to "Stay away from the warehouse * * * [b]ecause the place was under surveillance" (R. 187-8). For a couple of weeks thereafter, the witness kept away from Room 908 (R. 188). But fearful because he "had his name on the lease," Levenberg then moved the books into the basement of the building the "first chance" he had (R. 188).

Concerning the maintenance of the "warehouse," the witness explained that, at first, the defendant had a man take care of it (R. 188). In that period, the witness merely moved the books printed by him from the binder to the storage area and got paid (R. 188). In March, 1959, however, the defendant fired the man who had been taking care of the "warehouse" (R. 188-9). At this point, Mishkin convinced Levenberg to take over the job which entailed filling orders for the books and gave the witness one hundred dollars a month in cash to pay the rent (R. 185, 189). More specifically, during this time, Mishkin had the witness come "to the store, and he would give me a slip of paper with the books written down on it" (R. 189). The witness then went to the "warehouse," removed the books requested by the defendant and brought them "back to his store" (R. 189).

Usually—"nine out of ten times"—the store to which Levenberg brought the requisitioned books was Publishers Outlet (R. 189). Sometimes, however, after March, 1959, the witness delivered books requisitioned by the defend-

ant to the Main Stem Book Store, Broadway and 49th Street (R. 189-90).

The Main Stem Book Store, according to the witness, was opened by the defendant "around the beginning of '59" (R. 190). The defendant referred to the store "as his store" (R. 191). In fact, Mishkin "was there when they opened it up. He was there. He was giving everybody directions how to knock up the shelves, where to put the shelves, where to put the books" (R. 191).

At this point in his testimony, Levenberg—reiterating that he had printed Exhibits 1-30 inclusive and 34-72 inclusive for the defendant—testified in great detail as to the numbers and dates of each title printed by him (R. 193-253). The witness also indicated that, in those instances where a publisher was listed on the books, such statements were fictitious (*ibid.*).

Levenberg further testified that the drawings—Exhibits 1A-L, 4A, 21A, 23A-B, 26A, 28A, 29A, 30A, 34A, 37A, 60A, 70A, 71A, and 72A—were given to him by the defendant for reproduction in Exhibits 1, 4, 21, 23, 26, 28, 29, 30, 34, 37, 60, 70, 71, and 72 respectively (R. 254-272). These drawings, the witness indicated, had been given by him to his attorney Louis Field with instructions to hand them over to the police (R. 256-7, 272-3).

Testifying in another vein, the witness explained that, when Mishkin wanted certain books moved from the warehouse to Publishers Outlet, the defendant, in the event the order was a large one, wrote the desired titles and numbers thereof on a sheet of paper (R. 273-4). Exhibits

73A, B and C—three slips of paper given by the witness to his attorney to hand over to the police—were orders for books written by the defendant in October 1959, and given by Mishkin personally to the witness (R. 273, 274-6). Listed on the slips of paper (Exhs. 73A, B and C) were the names of books contained in the warehouse including twenty of the titles in evidence (R. 277-80).

The orders contained in the slips, however, were never filled by the witness (R. 274). Having received the orders from the defendant, Levenberg took the slips home with the intention of getting the books the next morning (R. 274). That night, Mishkin telephoned the witness and, cautioning the witness not to fill the order, instructed the witness to come to Publishers Outlet the next morning (R. 274-5). At the store, the next morning, Mishkin told the witness he "couldn't go near the warehouse any more because * * * it was hot" (R. 275).

About a week or two later, Mishkin advised the witness to "get rid of everything I had up in my shop" because "[t]he cops might come up there and search" (R. 275-6). Accordingly, Levenberg destroyed "everything I had in the shop" including negatives, plates and manuscripts (R. 276).

At the same time, however, Levenberg's attorney, with the witness' knowledge and consent, was conferring with the police (R. 304). Although "the police never threatened me. It is a funny thing; they never threatened me" (R. 305), Levenberg, after discussing the matter with his lawyer, "decided to give the police the warehouse" (R. 302).

And later that day he went to the basement to receive the police who had come to pick up the books (R. 304).

Finally, the witness explained that he had not destroyed the drawings because he liked them (R. 276). He did not destroy the three slips of paper because he had left them in a drawer at home and he had forgotten about them (R. 275, 276).

On cross-examination, Levenberg denied that he had told Mishkin that "for so much money I'll take you off the hook" (R. 293). In addition, he denied that he had made such a statement to Adler, Harry Goldman or one "Roundee" (R. 293-4, 310-11). In short, the witness denied "shaking down" the defendant (R. 310).

Paul Hayman, an offset and letter-press printer, testified that he had known the defendant for eight years (R. 373). Three hundred copies of Exhibits 31 and 32 had been printed by the witness for Mishkin at the latter's request in March 1959 (R. 373-7). Upon completion of the printing, both books were delivered by the witness to the defendant at "his place of business," Publishers Outlet on 42nd Street (R. 376, 377-8). For printing each title, Mishkin paid the witness forty cents a copy in cash at the Publishers Outlet (R. 375, 376). In both cases, the defendant did not give the witness a manuscript to print from but gave him plates (R. 376).

Concerning the legend "Andiron Press" appearing on the cover of Exhibit 32, the witness stated that, to his knowledge, Mishkin did not have a firm by that name (R. 379). Moreover, the witness' business was not known by

that name and he had never operated under such name (R. 379).

When shown Exhibit 33, the witness declared the book looked like a copy of something he "did quite some time ago" but he was not certain he had printed that particular exhibit (R. 379).

Dorothy Yeeto testified that she operated a typing service under the name Cold Type Composition Service, and that she had typed manuscripts for Norman Levenberg when the latter was using the name Automatic Offset (R. 578-9).

The witness identified Exhibits 82 through 90 as her file copies of bills for book manuscripts she had typed for Levenberg relative to Exhibits 25, 4, 21, 29, 72, 23, 71, 2, 5, and 34 respectively (R. 579-592).

Oscar Shaller, a bookbinder, testified that he had bound books for Norman Levenberg under an account named "Automatic Offset," 37 West 20th Street (R. 598).

Defense counsel stipulated that the witness had bound for Levenberg the following books: Exhibits 4, 5, 9, 10, 11, 24, 27, 38, 40, 41, 43, 66, 71, and 72 (R. 600-606).

It was further stipulated that, if Lawrence De Nino, a binder of York Bindery were called, he would testify that he bound the following books for Norman Levenberg: Exhibits 3, 14 through 20, and 46 through 56 (R. 609-11).

Corroboration

Detective **James Hartigan** of the First Deputy Commissioner's Office of the New York City Police Department testified that, while on active police duty on December 29, 1959, he removed a payroll book (Exh. 76) and a manila envelope (Exh. 77) from the Publishers Outlet Book Store, 254 West 42nd Street (R. 490-1). The envelope contained papers including Exhibits 77A through F inclusive (R. 491, 494, 509-10).

Marilyn Barasch testified that she had been employed for two and a half years as a bookkeeper for Book Sales, Incorporated, 352 Fourth Avenue—a wholesale book distributor and publisher (R. 492). Her duties, the witness advised, consisted in bookkeeping and supervising the office (R. 492). More specifically, part of her duties entailed processing invoices relative to her firm's book purchases (R. 492-3).

The witness identified Exhibits 77A through E inclusive as original invoices prepared by her firm in the regular course of business relative to sales of books made by her firm and mailed to the seller named in the documents (R. 494-502). Exhibits 78A through E inclusive, the witness identified, as carbon copies from her firm's files of the original invoices (R. 502-7).

The invoices and the carbon copies reflected sales of listed titles of books by Book Sales to Publishers Outlet, 254 West 42nd Street during October, 1958 (Exhs. 77A-E, 78A-E). The original invoices (Exhs. 77A-E) also bore the handwritten notations "OK" in ink.

The witness then identified Exhibit 77F as the bottom half of a monthly statement which had been sent in the regular course of business by her firm to one of its customers (R. 510-13). The witness stated that the monthly statement had been sent to Publishers Outlet because of her written notation "Publishers Outlet" which she placed therein after Publishers Outlet mailed it back (R. 513-16). When advised that the document had been taken from the files of Publishers Outlet and not that of her firm, she could not explain how the document had gotten out of her possession after it had been returned by Publishers Outlet (R. 516).

At this point, the witness testified that her firm also purchased books and that, in the event it later returned some of them, the firm prepared and sent, in the regular course of business, a debit memo to the seller (R. 517-8). The witness then identified Exhibits 79 and 80 as copies from the firm's files of debit memos relating to books returned to the defendant in October and December 1958 (R. 518-22). On one document the defendant's name was indicated as Eddie Mishkin (Exh. 79), on the other as Edward Mishkin (Exh. 80). Included in the list of books returned by Book Publishers to the defendant are several of the titles in evidence (Exhs. 79-80).

The witness further stated that she knew the defendant, and had seen him several times in Book Sales, her place of business (R. 522).

Finally, the witness testified that, when her firm sent out debit memos, entries thereof were made in the accounts

payable ledger books of the firm (R. 524). Exhibit 81 was her firm's accounts payable ledger sheet for the period of August, 1957 to December 1958—for the account of Edward Mishkin (R. 524-6). The witness further testified that the ledger sheet (Exh. 81) reflected the debit memos (Exhs. 79 and 80) which had been sent out (R. 526).

Alfred H. Schaeffer, an attorney, testified that he was treasurer of the Metropolitan Title Guarantee Company which among other things services mortgage extensions for the Staten Island Savings Bank (R. 593-4). The witness identified Exhibit 91 as a mortgage extension he had negotiated between the bank and the defendant whom the witness knew (R. 594-6).

At this point, defense counsel stipulated that the signature "Edward Mishkin" appearing on Exhibit 91 was placed thereon by the defendant (R. 594-6).

Again, at this point in the trial, Exhibit 93 was received in evidence (R. 611-13). That document was a certified copy of the certificate of incorporation of Main Stem Books, Inc., and dated September 11, 1958. It listed one Edward Mishkin as a director and stockholder in the corporation.

Robert S. Tyson testified that he was an attorney associated with the law firm of Sincerbeaux & Shrewsbury, 55 Liberty Street, that he was secretary of, and his firm the attorneys for, the 1603 Broadway Corporation owning real estate at 1603 and 1607 Broadway, and that one of the stores therein was leased to Main Stem Books (R. 613-14).

The witness recalled seeing the defendant on one occasion in September, 1958 (R. 614). At that time, Tyson attended a conference relative to the prospective leasing of the store known as 1607 Broadway by the defendant and his associate Schenkman (R. 614). Present at that conference were the witness, Mishkin, Schenkman, the defendant's attorney, and the building manager (R. 614, 621).

The leasing of the store, however, was not consummated that day, but was later entered into between the witness' corporation and Main Stem Books (R. 615).

Tyson identified Exhibit 94 as the executed lease with his signature thereon (R. 615). Also present on the lease for Main Stem Books, Inc. was the signature "Edward Mishkin Pres" (Exh. 94). The lease was to commence October 31, 1958, but the term thereof was not indicated (Exh. 94).

After the witness signed the lease, he delivered it to his associate John F. Lydon for signature by the other party (R. 616). The witness did not see the defendant sign the lease (R. 615, 616).

Early in 1960, Tyson negotiated an assignment of the lease (R. 617). However, between October 1958 and early 1960, Main Stem was the only lessee of the property in question (R. 617).

At this point, the witness identified Exhibit 95 as a letter, dated February 18, 1960, directed to Phil's Book Shop Inc., 1607 Broadway, prepared and signed by him consenting to the assignment of the lease from Main Stem to Phil's Book Shop (R. 618).

John F. Lydon testified that he was an attorney associated with the firm of Sincerbeaux & Shrewsbury (R. 624-5).

The witness recalled entering into negotiations relative to the leasing of the store at 1603 Broadway in September, 1958 (R. 625). Present at the conference were the witness, the defendant, Schenkman, a Mr. Ringle and another attorney (R. 625, 626, 629). The conversation took place both in the "executive offices" of the building and in the vacant store at 1607 Broadway (R. 625). All persons present discussed the leasing of the store and whether the lease could be executed prior to the formation of the corporation which was going to lease the store (R. 626-7). Lydon, however, could not recall which person said what (R. 527).

Referring to the executed lease of the premises (Exh. 94), the witness could not recall whether it had been left with him for execution nor whether he was present when the defendant signed it (R. 632).

At this point, it was stipulated that the defendant had executed the lease for Main Stem Books (Exh. 94) in September 1958, and that four or five months thereafter the defendant divested himself "on paper" of stock in that corporation and ceased to be an "officer of record" (R. 633, 635).

It was stipulated that, if Lieutenant **Richard Dimler** of the First Deputy Police Commissioner's Office were called, he would testify that, on March 9th, 1960, the defendant wrote all the handprinted and handwritten nota-

tions on Exhibit 97—an arraignment card in the 5th Precinct Police Station (R. 639).

It was also stipulated that Lieutenant **Joseph McNally** of the Police Laboratory of the New York City Police Department was an expert on questioned documents (R. 637, 641). It was further stipulated that if Lieutenant McNally were called, he would testify that he had compared the defendant's admitted signatures on Exhibits 91 (the mortgage extension agreement) and 97 (the arraignment card) with the writings on Exhibits 73 A, B and C (written orders given by the defendant to the printer Levenberg), and that the writing on Exhibits 73 A, B and C was executed by the defendant (R. 639-40). Comparison of the handwriting on Exhibits 91 and 97 with Exhibit 74 [contract between the defendant and the writer Rosen (Roskolenko)] established that the signature "Edward Mishkin" on Exhibit 74 had been written by the defendant (R. 640). Again comparison of the defendant's admitted writing and printing on Exhibit 97 with the written word "OK" on Exhibits 77A through E (Book Sales' invoices of sales to Publishers Outlet and taken from Publishers Outlet) and the notation "OK Ed" on Exhibit 77F (Book Sales' monthly statement taken from Publishers Outlet) demonstrated that the aforementioned statements on Exhibits 77A through F were written by the defendant (R. 640-1).

Bernard Abrams testified that he had been the accountant for the Publishers Outlet Store since it started business in 1957, and that he handled the payroll for that store (R. 644-5).

During the period April, 1958 through December, 1959, the witness recalled seeing the defendant twice in the store (R. 648). On those occasions, Mishkin was "watching customers" (R. 648).

The witness insisted that Harvey Revo was president of the corporation and the defendant an employee despite the fact that a payroll book for the store for the period January 1957 to December 1958 (Exhibit 76) reflected both the defendant and Revo as employees. Further, for the period January 1957 to August 1958, the defendant's salary was $175.00 per week and Revo's $100.00 per week (R. 645-52).

Abraham Lieberman testified that he had been president of Book Sales for seven years, and that his firm bought and sold books "all over the country" (R. 545-6). The witness had known the defendant for eight or nine years and had done business with him (R. 546). Upon examination of two of his firm's debit memos (Exhs. 79 and 80), the witness recalled that he had done business with the defendant in the years 1958 to 1960 (R. 546-7). The witness, during that period, conversed with Mishkin not only in the witness' office but also in the book store, Publishers Outlet (R. 547-8). Also, when the witness desired to get in touch with the defendant, the witness telephoned Publishers Outlet (R. 548).

Peter C. Vaccarella testified that he was the owner of a bookstore bearing his name in a subway arcade, 205 West 42nd Street (R. 557-8). During the period December of 1957 to March 1, 1958—when the witness opened his own

store—he and the defendant together operated a bookstore under the name Telephoto Publishing Corporation at 218 West 47th Street (R. 558, 564).

After Vaccarella had opened his own business, he purchased books from the defendant personally for resale (R. 558-9). The witness paid the defendant in cash at the rate of a dollar or two per book and resold each at four or five dollars (R. 562-3). In connection with the purchase of the books, Vaccarella always saw Mishkin in Publishers Outlet on 42nd Street and had occasion to see the defendant there on an average of once a month from March of 1958 to four or five months prior to the trial [October, 1960 (R. 124)] (R. 558-9, 560-1).

The witness further testified that he had purchased from Mishkin for resale copies of Exhibits 4, 23, 24, 26, 28, 37, 38, and 40 (R. 559-60).

Concerning Publishers Outlet, the witness testified that he had the impression that the defendant was part owner of it, and, in fact, it was his recollection that Mishkin had once so advised him (R. 561-2, 568-78).

Jay Dreyer testified that he was a salesman for Berkley Publishing Company, 101 Fifth Avenue, that he knew the defendant, and that he had done business with Publishers Outlet Store from September to December 1957 and from May to July 1957 (R. 653). During the latter period, he visited the store twice a month and he saw Mishkin there at least once a month (R. 654).

On these occasions, the defendant stood at "the side of the shop" and "I might nod to him, he might nod to me"

(R. 655). The witness, however, dealt with other men in the store (R. 655).

On one occasion, after a conversation with a clerk, Dreyer brought "his" covers and "I gave them to Mr. Mishkin and he sort of rifled through them rapidly and he handed them back to me without comment and then I went back to try and sell to * * * [a] clerk or the men in the store" (R. 656).

On another occasion, the defendant "nodded his head to a clerk on the floor toward a customer who was near some books that were in cellophane wrappings and the clerk then went over and asked the man if he could help him with the purchasing of the books" (R. 657).

Again, Dreyer noted that "clerks in the store would approach Mr. Mishkin and talk to him and whisper to him and he would listen, cock his ear and then he would turn, he would pick his head up and they would walk away" (R. 658-9).

Further, the witness declared that he had never sold the defendant any of the books contained in Exhibits 1 through 72; that, in fact, he had never sold them to anyone; and that his company had nothing to do with those books (R. 658-9).

Finally, the witness noted that he had never seen the defendant sell a book or wait on a customer (R. 662).

The Defense

William Walsh, a salesman, testified, when asked if he had been convicted of a crime, that he had been convicted "Just in the store there, with the books" (R. 642).

The witness further testified that he had been employed as a salesman by Mr. Martin Kleinberg of Kingsley Book Store, 220 West 42nd Street (R. 643). On about eight or ten times Norman Levenberg of Norman Offset Company delivered packages of books to the store (R. 643). Levenberg gave the witness an invoice for the books, and the witness told him, "That will be taken care of" (R. 643).

The witness never saw his employer Kleinberg pay Levenberg by check for the books (R. 643). In fact, the witness did not know whether Levenberg was selling merchandise on his own account or for someone else (R. 643-4).

Frank Adler, a former bookstore owner, testified that he had been convicted of possessing obscene books and of petit larceny (R. 664-5, 672-3).

About a month and a half prior to the trial, the witness testified, he, Levenberg and Goldman—also known as Roundee—had a conversation on 42nd Street near 8th Avenue (R. 665). Goldman introduced Levenberg to the witness, stating that Levenberg "wants to get Mishkin" (R. 666). Levenberg then asked the witness to tell the defendant that he [Levenberg] would leave town or not testify or change his testimony if the defendant gave him money (R. 666). The witness agreed to give the message to Mishkin, and later spoke to him (R. 666).

Summary of Argument

According to sound and venerable interpretation, our Constitution bestows no freedom to distribute pornography. On fair appraisal, there is little question that the fifty-two exhibits in the present case earn no protection. Concededly undistinguished by literary, artistic, or intellectual interest, their primary feature is a blatant appeal to prurience in a manner patently offensive to community standards. In this regard appellant's simple claim, that the books with predominantly sado-masochistic themes are repulsive rather than stimulating to the average man, does not allow him to escape the character of his creations. For, logically, the average man is not the proper audience by which to measure material appealing primarily to the abnormal. Rather those whom the publications are likely to reach are the proper referents, and this conclusion, supported by numerous cases and commentaries, is not foreclosed by appellant's misinterpretation of *Roth*.

Furthermore, the existence of a group specially susceptible to sado-masochistic material, as well as the nature of their tastes, are attested to by psychiatric literature, the logic of the market economy, and the instructions of Mishkin to his writers and artists, the defendant outlining in detail just what the books should contain and why. Indeed, Mishkin's purposeful pandering to prurience is firm evidence of the pornographic nature of his product.

Books of a sadistic and masochistic nature are not, as appellant argues, free from control. Nor do these statutory terms have any meaning apart from the word "ob-

scene." The words "sadistic" and "masochistic" in the New York statute simply describe a particular form of obscenity, but obscenity nonetheless. Certainly books of this type fall well within the constitutional definition of the term "obscene." Further, the legislative history of the statute as well as the opinion of the New York courts have construed the words "sadistic" and "masochistic" to be synonymous with the word "obscene."

Nor is the word "obscene" vague in a constitutional sense, rulings of this Court foreclosing appellant's well-worn argument.

Furthermore, scienter was overwhelmingly established by a variety of evidence introduced at the trial. Mishkin, as publisher, directed what the books were to contain, and told writers and artists that they should concentrate on highly sexualized representations, especially sexual aberrations. Moreover, the covers, contents, selling price, and falsification of his publishing activities all combine to prove conclusively that Mishkin had the required mental element of scienter. Appellant's claim that scienter requires the defendant to make a constitutional judgment that the book is obscene goes far beyond limits of reason and authority.

Finally, the searches and seizures conducted in the present case were all lawful. The majority of the publications were seized pursuant to the voluntary consent of an accomplice who was in charge of the warehouse where the books were stored. Further, a search warrant was obtained in addition to the consent of the custodian, and the defendant did not properly challenge the sufficiency of the warrant

at the trial. Other publications were seized incident to arrests at bookstores open to the public. As contraband they were properly subject to seizure, and appellant's contrary arguments based on decisions involving prior restraints in civil proceedings, are inapplicable to the procedures of criminal prosecution. Moreover, one book which Mishkin published, was sold to a policeman in a bookstore, the sale giving him clear title and obviating any issue of search and seizure.

POINT I

The materials underlying the conviction enjoy no constitutional protection, for they are obscene according to the appropriate standards, judges, and audiences for measuring that concept.

The intellectual and artistic ideals of this Nation, fundamental to our concepts of a civilized society, place the realms of the expression beyond the reach of government. Among those necessary curtailments of absolute personal freedom, speech enjoys a high immunity. Yet not every verbal or pictorial utterance is protected speech, for the value of the shield is affected by the nature of the utterance and the damage it inflicts. Disorderly, panic-producing, libelous, fraudulent, and imminently riotous declarations are traditionally reserved for governmental suppression. Similarly, history and near-universal usage exempts the dissemination of obscenity from Constitutional protection.

At an earlier time obscenity was considered a matter "punishable only in the Spiritual Court" [*Regina* v. *Reed*,

Fortescue 98, 92 Eng. Rep. 777 (1708)]. The English courts, however, a short while later came to regard obscenity as offensive to the common law [*Rex* v. *Curl*, 2 Strange 788, 93 Eng. Rep. 849 (K. B. 1727)], and this view was received into American jurisprudence [*Commonwealth* v. *Sharpless*, 2 S & R 91 (Pa. Sup. Ct. 1815); *Commonwealth* v. *Holmes*, 17 Mass. 336 (1821)]. But it was not until the Victorian era that a definition or legal test of obscenity was fashioned in *Regina* v. *Hicklin* [L.R. 3 Q.B. 360 (1868)].

Unfortunately, however, the *Hicklin* test—"whether the tendency of the matter charged is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall"—could operate to ban anything from Boccaccio's *Decameron* [*Commonwealth* v. *McCance*, 164 Mass. 162, 41 N. E. 133 (1895)] to Dreiser's *An American Tragedy* [*Commonwealth* v. *Friede*, 271 Mass. 318, 171 N. E. 472 (1930)]. And the reign of the *Hicklin* rule further enhanced the climate and opportunity for censorship by allowing the self-appointed "crusaders," inflamed by any sexual representation, to scorch by their own passions valued works of social and artistic expression. But while the misguided excesses of such people are difficult to quell, their weapon, the *Hicklin* rule, was blunted by the enlightened decision of Judge Wolsey in *United States* v. *One Book Called "Ulysses"* [5 F. Supp. 182 (S. D. N. Y. 1933), *aff'd* 72 F. 2d 705 (2d Cir. 1934)], and finally broken by this Court in *Roth* v. *United States* and *Alberts* v. *California* [354 U. S. 476 (1957)].

The outstanding impact of *Roth*, of course, was the final abolition of the pernicious practices of reviewing selected passages, isolated from the work as a whole, and judging their effects by the minds of children. Instead, reaffirming that "obscenity is not within the area of constitutionally protected speech or press" [354 U. S. at 485], the Court required reference to the "dominant theme" of the entire piece questioned, and created the renowned phrase "appeal to prurient interest" to characterize the obscene [*id.* at 489]. Moreover, implicit in the exclusion of obscenity from the protection of the constitution is that the material must be "utterly without redeeming social importance" [*id.* at 484]. An additional test was later enunciated by this Court in *Manual Enterprises, Inc.* v. *Day* [370 U. S. 478 (1962)] where it was held that material must also be "patently offensive" in that it goes substantially beyond customary limits of candor in representing sexual matters [*id.* pp. 482-6]. And these standards, despite much criticism, were all recently reaffirmed by this Court in *Jacobellis* v. *Ohio* [378 U. S. 184, 191-2 (1964)].

Perhaps the confusion engendered by *Roth* is due in some measure to the eliptical phrasing of the test so it appears to express a single standard. The language of the critical formulation of *Roth* was:

> "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests." [354 U. S. at p. 489.]

Unfortunately, the test, compressed into one brief sentence, tends to elide two quite different measurements. The amal-

gam, as commonly read, calls upon the average man, with his appreciation of general standards of decency, to measure by his own libido the special appeal to prurience of certain, often bizarre, materials. Since current social values have only the most trivial relation to the private erotic itch the Court could not have intended so illogical a test at the nexus of this far-reaching problem. Rather "community standards" heralds the test of "patent offensiveness" made explicit in *Manual Enterprises,* for the customary limits of candor correctly refers to the contemporary sensitivity of the community at large. Moreover, the "average man" who heads the *Roth* construct can only be considered a judge of offensiveness to community standards, and neither of redeeming social value nor of prurient appeal. Certainly the findings of a jury are not conclusive or even presumptive of the social value of a work [*Jacobellis* v. *Ohio,* 378 U. S. 184, *supra*], and indeed it would be dangereous to entrust the average man with this decision. For, realistically, the sometimes subtle aesthetic merits of a work may be beyond his understanding and intellectual values, and should no more be fettered to the tastes of mediocrity than to the appreciation of children. Too, he cannot be the measure of prurient interests, because much of what is clearly and commonly recognized to be pornographic appeals only to the peculiarities of the abnormal viewer. At most, the *Roth* construct says only that "the average man" should judge whether the work "appeals to prurient interests." It does not say that it must appeal to the prurient interests of the average man. Surely, *Roth* did not posit an "average man" who is erotically stimulated by the lowest and most perverse representations of sex and the sexual experience.

A synthesis of judicial opinions discloses not a tangled morass of verbal formuli, but a comprehensive, realistic delineation of the ambit of constitutional protection. There are actually three separate standards upon which the constitutional protection rests, any one of which can support the lawful dissemination of material. And further, each standard must necessarily be judged by a different litmus quite independently of each other. Clearly, redeeming social value must be judged by the courts, perhaps with the aid of experts and critics. No less obviously, patent offensiveness must be judged in terms of contemporary community standards, this being the domain of the average man who is most expressive and understanding of the community's tolerance. Finally, "appeal to prurient interest" must be taken quite literally and alone, and be judged in terms of the reaction of those likely to be reached by the material. Lest this be misunderstood, it should be stated that there is no danger of returning to *Hicklin* by using even the most perverse and susceptible viewer as the referent for this latter characteristic. For even if his prurient interests are aroused by something quite innocent, as may indeed be the case, the material could not be banned unless it is also patently offensive to the average man and lacking utterly in redeeming social value as the courts understand the values of the society.

In the present case, neither appellant nor *amici* claim that the publications have the slightest redeeming literary or social value, and they tacitly admit, as they must, that the exhibits are patently offensive, for indeed these books go well beyond the customary limits of candor in description and depiction of perverse sexual matters. But falling

heir to the common confusion of tests and audiences, the appellant argues that the publications dealing with sado-masochism are exempted by the "prurient interest" test of *Roth*, since presumably the aberrant appeal of such literature would bore or repulse the "average" or "normal" man rather than excite lustful response. His misinterpretation of *Roth*, however, is not at this date foreclosed to argument, since this Court in *Manual Enterprises* was not required, and thus specifically declined to discuss, the audience appropriate to measure "appeal" [370 U. S. at 481-482].

Nevertheless, the compelling combination of what is implicit in *Roth*, other authorities, scholarly opinion, reason, and public policy is persuasive that the prurient appeal of material must be measured by those whom it is likely to reach;* whether in some cases sexual deviants, or in others the average man himself.

* It should be mentioned that certain commentators, both on the bench and off, speak of an audience to whom the material is directed, rather than of those whom it is likely to reach. Since these authorities are nevertheless in agreement that the prurient interests of susceptible groups, not necessarily the average man, are the proper interests to be considered under *Roth*, they are thus pertinent to the question presented. But their manner of locating that susceptible group, through intent of the disseminator, seems less useful than finding it through the character of the material. Actually, "direction" of material to an audience is more properly evidence of what is likely to reach that audience, for direction of marketable material is usually deliberate. Furthermore, direction to a particular audience may be more difficult in terms of proof, involving as it does the intent of the disseminator who may or may not testify at a trial. It also, of course, opens an avenue to subterfuge through the giving of wrong directions. The nature of the material, however, would usually be more plain, and the audience more easily inferable from the contents. And ultimately, since this Court has used only the material to determine obscenity [*Manual Enterprises* v. *Day*, 370 U. S. at pp. 487-8], it would be more consistent to continue confining the inquiry to the character of the work itself.

While the *Roth* test itself gives little hint of the proper audience, the Court upheld, as "sufficiently following the proper standard," the trial court's instructions to the jury to test the effect of the material "upon all those whom it is likely to reach" [354 U. S. at 490]. Although the court continued by advising the jury to "determine its impact upon the average person in the community" [*ibid.*], the Supreme Court endorsement is determinative of the audience in *Roth* only. It necessarily falls short of general application, since the material in *Roth* was the sort "likely to reach" the average person in the community. Thus, because its primary appeal was to the average man's prurient interest [see, Lockhart & McClure, Obscenity, The Developing Constitutional Standard, 45 Minn. L. Rev. 5, (1960)], the average man became the proper referent. Logically, however, the rationale—the effect of the material is to be considered upon all those whom it is likely to reach—compels reference to an audience other than the average man where the material is of a character likely to reach a special audience.

The *Roth* test of obscenity is drawn from the definition proposed in the model penal code of the American Law Institute [A. L. I., Model Penal Code, §207.10 (2) (Tent. Draft No. 6, 1957); *Roth* v. *United States,* 354 U. S. at 487 n. 20, *supra*]. But while *Roth* did not further specify the relevant audience, the model penal code confronts the issue and provides an answer in accord with the foregoing discussion: "Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially

susceptible audience [*id.*]. The new New York Penal Law, effective Sept. 1, 1967, has endorsed and adopted the suggestions of the American Law Institute relating to both the definition and appeal of obscene material [N. Y. (future) Penal Law, §235.00(1)].

Other legal scholars, such as the obscenity experts Lockhart and McClure, have also reasoned that the average man cannot be the litmus for material not likely to reach the average man. Indeed, they find in a contrary conclusion the creation of an impermissible paradox in which a type of material which "is the one class of material now certainly obscene" would be exempt from obscenity prosecution and control [Lockhart & McClure, *op. cit. supra,* 45 Minn. Law Rev. 5, 73 (1960)]. Thus, in favoring the adoption of a "variable obscenity" test, these commentators have underscored as an advantage the unquestioned inclusion of "hard-core" material appealing to deviants [45 Minn. Law. Rev. 5, 77-9, *supra*; also see the same conclusion in Gerber, A Suggested Solution to the Riddle of Obscenity, 112 U. Pa. L. Rev. 834, 846 (1964)].

Moreover, cases which have considered material appealing to a special audience, rather than to the general public, have inevitably arrived at the conclusion that the special audience must be the one in whose response prurient interest is measured. The Court of Appeals in *Manual Enterprises* v. *Day* [289 F. 2d 455 (D. C. Cir. 1961), rev'd on other grounds, 370 U. S. 478, *supra*], for instance, found challenged magazines to have been "deliberately published because of their effect upon homosexuals" [*id.* at p. 456]. The court felt that "the real meaning of *Roth* is that the

object in question is not to be considered in terms of the reaction of an isolated atypical consumer" [*ibid.*]. Deciding that the average member of the community would be "an atypical reader of these magazines," the court concluded:

> "The proper test in this case, we think, is the reaction of the average member of the class for which the magazines were intended, homosexuals" [*ibid.*].

Noteworthy too is the learned decision by Judge Palmieri in *United States* v. *31 Photographs* [156 F. Supp. 50 (S. D. N. Y. 1957)], a case involving the importation of concededly hard-core pornography by scientists of the Institute for Sex Research at Indiana University. The central question there presented was whether material which would appeal to the prurient interests of the average man could also be considered "obscene" when likely to reach only a dispassionate scientific audience. Initially commenting upon the standard to be applied the court stated:

> "While the rule is often stated in terms of the appeal of the material to the 'average person,' Roth v. United States * * * it must be borne in mind that the cases applying the standard in this manner do so in regard to material which is to be distributed to the public at large. *I believe, however, that the more inclusive statement of the definition is that which judges the material by its appeal to 'all those whom it is likely to reach.'* United States v. Levine, 2 Cir. 1936, 83 F. 2d 156, 157. Viewed in this light, the 'average man' test is but a particular application of the rule, often found in the cases only because the cases often deal with material which is distributed to the public at large." [156 F. Supp. at pp. 354-5, emphasis supplied]

Thus the court ruled that the importation of the material by the scientists was permissible, their cold professional

detachment, presumably, being in no danger of being melted by the salacious nature of the material [also see, *United States* v. *One Unbound Volume, etc.*, 128 F. Supp. 280 (D. C. Md. 1955); *United States* v. *One Package*, 86 F. Supp. 737 (2d Cir. 1936); *Parmelee* v. *United States*, 113 F. 2d 729 (D. C. Cir. 1940); *United States* v. *Smith*, 45 F. 476 (D. C. Wisc. 1891); *United States* v. *Chesman*, 19 F. 497 (E. D. Mo. 1881)].

Returning to the present case, there is no doubt whatever that the sado-masochistic books published by Mishkin were likely to reach primarily those people whose prurient interests are aroused by portrayals, both verbal and pictorial, of these sexual deviations. Since, as the appellant assumes, the average man is not a secret sado-masochist and is therefore not likely to purchase the exhibits in the case, he is obviously the wrong audience by which to measure the prurient appeal of Mishkin's output. However, there is no doubt that there does exist a group peculiarly susceptible to the prurient appeal of sado-masochistic material [see, *e.g.*, Sexual Behavior of the Human Female, Indiana University Institute for Sex Research, pp. 676-81; Caprio, Variations in Sexual Behavior, pp. 206, 265, 271, 273 (1957); New York Legislative Documents, vol. 3 (1956), pp. 60-66]. The Indiana Institute reports, for instance, that:

> "Persons who respond only or primarily to objects which are remote from the sexual partner, or remote from the overt sexual activities with a partner are not rare in the population. This is particularly true of individuals who are erotically aroused by high heels, by boots, by corsets, by tight clothing, by long gloves, by whips or by other objects which suggest sado-masochistic relationships" [*supra*, pp. 678-9].

Obviously too, the observation that such people "are not rare in the population" is implicitly confirmed by the plethora of publications pandering to their tastes which Mishkin produced, for nothing short of a substantial market would have warranted his investment.

While appellant acknowledges that there may well exist "characters and cults" whose prurient interests are stimulated by the material (brief, p. 17), both he and *amicus* argue that the prosecution must independently offer proof of prurient appeal to satisfy constitutional requirements. They rely especially on the recent decision of Judge MOORE in *United States* v. *Klaw* [—— F. 2d —— (decided July 15, 1965), reprinted in appendix B of appellant's brief] which held that the complete absence of evidence in the record concerning the nature of the material's appeal flawed the judgment, the jury being in no position to determine appeal without expert help.

In this regard, *Klaw* goes a good bit further then pronouncements of this Court in related matters. For instance, in *Smith* v. *California* [361 U. S. 147, 164-7 (1959)] Justice FRANKFURTER, concurring, thought it error to refuse to hear proof of community standards when offered, and Justice HARLAN agreed [*id.* pp. 171-2]. But their view was not, as in *Klaw,* that the prosecution had the burden of introducing such proof; rather they stated only that the State "is not privileged to rebuff *all* efforts to enlighten or persuade the trier" [*id.* 172, emphasis in original]. New York, it may be noticed, has ruled only that evidence of other similar publications being offered for sale in the community is not probative of contemporary standards [*People* v. *Finkelstein,* 11 N. Y. 2d 300 (1962)].

But in the context of this case, the questions of whether the burden is on the People to introduce proof of prurient interests, and whether proof of experts must be accepted by the court when offered, are academic. For, although neither side offered independent expert testimony at the trial, the record contains much that could be considered evidence of the prurient appeal of sado-masochistic material. Thus the *Klaw* flaw was, to all intents and purposes, absent.

Both the existence of a specially susceptible audience and the nature of the appeal of sado-masochistic books were evidenced clearly by the instructions given to the writers by the appellant, avowedly something of an expert in the field. Thus, in generating the publication of the book *Her Highness* [Exh. 5], Mishkin told the writer Kenneth Johnson "to deal graphically with the implementation of wheels [*sic*, probably "weals"] on a female's body, of the darkening of flesh under flagellation; and he [Mishkin] said that the people who read these kinds of books didn't care particularly about sex. He wanted me to concentrate mostly on the changing of the color of flesh when people were being flagellated, and he didn't want any blood in it" (R. 434). Similarly, with reference to the writing of *Columns of Agony* [Exh. 43], Mishkin told the same writer "practically the same thing that he had told me about the other books that he wanted on flagellation, not too much sex, that the people were more—the people who buy this book were more interested in the reddening of flesh and in no blood being let because he wanted not too much violence and in—in wheels [*sic*] appearing on the bodies of the victims because that is what the people who bought these books wanted" (R.

446). And for the book *So Firm and So Fully Packed* [Exh. 23] Mishkin told the writer first to "learn about fetishes" (R. 436-7). Further, for the book *Masque* [Exhs. 25 & 59], the writer Leotha Hackshaw was informed by Mishkin that he "wanted an emphasis on beatings and fetishism and clothing—irregular clothing, and that sort of thing" (R. 414).

The results, as a glance at the exhibits will reveal, were in accord with Mishkin's instructions, for the publisher knew his audience, custom-tailored his publications for them, and made his profits from their desire for the material.

Indeed, while perhaps not an integral part of the *Roth* standards, a defendant's deliberate catering to prurient interests has itself been regarded as an important feature in finding obscenity. Thus, concurring in *Roth,* the Chief Justice stated that "the conduct of the defendant is the central issue, not the obscenity of a book or picture" [354 U. S. at 495], and found criminal the conduct of defendants "engaged in the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect" [*id.* at 496].*

Accordingly, under such circumstances, it would be completely anomalous to hold these books within the constitutionally protected sphere because their appeal to the aver-

* Other commentators also have advocated an obscenity test based on the conduct of the disseminator alone [Paul & Schwartz, Federal Censorship 216 (1961)]; also see Model Penal Code §251.4, proposed official draft 1962, which designates criminal the dissemination of material "whether or not obscene, by representing or suggesting that it is obscene."

age man is limited. Their content, dominant theme, indeed only theme, and treatment are all patently offensive; aesthetically the books are gross and unattractive; they appeal to prurient interests, and completely lack merit, artistic, literary, or intellectual. In brief, what has been said of pornography in general attaches to this particular form of it. It is no less obscene.

Finally, no challenge is made to the finding of obscenity where the exhibits portray sex in its more "conventional" forms (Exhs. 2, 3, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 60, 69, 70, 71, 72). Indeed, the last exhibit, the book *Queen Bee*, was separately considered by the New York Court of Appeals in *People* v. *Finkelstein* [11 N. Y. 2d 300 (1962), cert. denied 371 U. S. 863 (1962)] where it was found to be "definitely obscene * * * They unquestionably meet the *Roth* test" [*id.* at p. 305]. And, it may be added, the New York high court reviewed this publication in light of an interpretation of *Roth* which withdraws constitutional protection from "hard-core" pornography only [see, *People* v. *Richmond County News*, 9 N. Y. 2d 578 (1961)].

Apparently realizing that his primary claim does not encompass seventeen of the exhibits, the appellant is forced to create a basis for reversal which is all inclusive. Thus he argues that Mishkin was convicted under two theories, one that the books are sadistic and masochistic, and the other, that they are obscene. Concluding an almost *pro forma* point he argues that there is no way of knowing upon which theory any particular book was condemned.

The case cited by appellant for support, *Stromberg* v. *California* [283 U. S. 359 (1931)], is, however, quite in-

apposite. In *Stromberg* the defendant was convicted under a statute proscribing the display of a red flag under three separately enumerated circumstances. Display was prohibited as a symbol of opposition to organized government, or as a stimulus to anarchistic action, or as propaganda of a seditious character. The jury, instructed that the three grounds were disjunctive, nevertheless returned a general verdict of guilty. Thus it was impossible to say which clause was violated, and this Court, finding the first clause unconstitutional, necessarily reversed the conviction, for the verdict may have rested exclusively on that clause.

In the present case, however, the sole theory of the prosecution was that all the books were "obscene," those of the sado-masochistic type being no less so because of their specialized appeal. The trial court also found all the books to be obscene under the statute, whether of the sado-masochistic type or not (R. 724-5). Indeed, the court specifically held that the words sadistic and masochistic were "synonymous with obscene" (R. 722). Thus not disjunctive theories as in *Stromberg* underlay the judgment, but one ground, obscenity, was the sole measure of guilt.

Indeed, even were two theories utilized, appellant's argument must still fail. In *Stromberg* where, as the Court noted, there was no way of telling upon which theory the conviction rested, the evidence apparently supporting each of the subsections. Here, by contrast, it is clear from the contents, character, and nature of each book in the present case which ones are primarily sado-masochistic and which are not. Consequently, the books of a more normal sexual type support the judgment on the grounds of obscenity alone, regardless of the foundation supporting the deviant material.

POINT II

"Sadistic" and "masochistic" materials are not inherently distinct from obscenity, nor are those words, or the word "obscene" unconstitutionally vague.

Handily, the appellant weaves straw into gold, arguing that "sadistic" and "masochistic" writings are constitutionally protected speech. Insofar as Section 1141 of the New York Penal Law covers material of this description, he claims, it goes beyond "obscenity," the limited area of permissible state action. Thus, he concludes, the New York statute as applied is unconstitutional.

The key to appellant's error is a false dissociation between words embraced by the same concept. The concept of obscenity in a constitutional sense comprises material which is patently offensive, appealing primarily to prurience, and devoid of redeeming social or artistic value. Implicit also in the word obscene may be a characteristic sexual, erotic, or libidinous flavor. Regardless of how the terms sadism and masochism may be defined themselves, there can be little doubt that a discernible portion of such material overlaps the boundaries of obscenity, fully satisfying each essential element of the legal definition of the area. To this extent, sadistic and masochistic matter is exempt from constitutional protection. Nor is there the slightest doubt that the material to which the statute was applied in the instant case, though more particularly describable as sado-masochistic, falls well within the more general category of obscenity. It is all clearly of that

sex-linked genus which is patently offensive to the average man applying contemporary standards of candor; it is appealing to the prurient interests of a psychiatrically identifiable group; and no court could find redeeming value in these items, social, artistic, or scientific. It is therefore obscenity.

Section 1141 of our Penal Law suffers, it must be acknowledged, from grievous prolixity. Drafted in the old style, one word is never used where six can be found to say the same thing. The result is not only cumbersome, but prone to construction by the maxim *expressio unius est exclusio alterius*. Where this form of drafting is used, the string of synonyms and subcategories must be complete, else some might be deemed excluded by omission. Thus the necessity for adding "sadistic" and "masochistic" which would otherwise be subsumed within the simple term "obscene."*

The addition of the words "sadistic, masochistic" to the New York statute in 1956, moreover, does not indicate that the law was stretched beyond obscenity. It was the express intent of the framers to relieve some doubts in lower courts as to whether this special form of obscenity was proscribed [Testimony of Stephen Kennedy, N. Y. Legislative Documents, vol. 3 (1956)]. The legislature simply added the words as clarification that such material was

* Judge Moore of the Second Circuit Court of Appeals dealing with the same type of material under a federal statute, which does not employ the words "sadistic" or "masochistic" [18 U. S. C. §1461], did not even consider the possibility that this particular form of obscenity might not be encompassed by the proscription of all obscenity [*United States* v. *Klaw*, —— F. 2d —— (2nd Cir. 1965) (reprinted in appendix to appellant's brief)].

indeed obscene. The whole tenor of the hearings and legislative evaluation and report indicates as much.

Furthermore, the use of the word "or" in the statute is not especially significant, for that word, if it has any importance, simply separates particular forms of obscenity, indicating that any one of the enumerated varieties of obscenity will support a criminal charge under the section. Certainly, if a different substantive crime were intended, one apart from obscenity, it would not have been proscribed by its inclusion in the list of modifiers for the titled crime.

Nor can the appellant establish his claim that he was tried on a theory other than obscenity. The opening remarks of the prosecutor which he cites (brief, p. 8) do not support his present allegation, for the ~~jury~~ Court was simply told that most of the writings were of a special type of obscenity, not something other than obscenity.

Indeed, the trial court below in delivering its opinion, stated that the words "sadistic" and "masochistic" along with the string of adjectives following "obscene" in the statute were "synonymous with 'obscene'" (R. 722), a conclusion reached previously in New York in *People* v. *Brooklyn News Co.* [12 Misc. 2d 768, 771 (Kings Co. 1958)]. This judgment, of course, has been affirmed by the Court of Appeals in *Mishkin,* albeit *sub silentio,* and this interpretation of the New York statute by New York courts is binding [*Kingsley Pictures Corp.* v. *Regents,* 360 U. S. 684, 688 (1959); *General Trust Co.* v. *Blodgett,* 287 U. S. 509, 513 (1932); *Williams* v. *Oklahoma,* 358 U. S. 576 (1959)].

In addition to his attempt to locate "sadistic" and "masochistic" beyond the realms of the obscene, the appellant raises an all too familiar issue, claiming that the terms are vague. Vagueness is a perennial problem haunting obscenity statutes, wont as they are to use numerous adjectives, more perhaps to show the vigor of the suppression than concern for enlightening draftsmanship.

But the statutory use of these words within the context of obscenity is sufficiently definite and precise to identify matter proscribed. Indeed, it is considerably more specific than the term "obscene" standing alone, and that word has repeatedly survived constitutional onslaughts on these grounds [*e.g., Roth* v. *United States,* 354 U. S. 476, *supra; Jacobellis* v. *Ohio,* 378 U. S. 184, *supra*]. "The constitution does not require impossible standards," it being adequate if it "conveys sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practice" [*United States* v. *Petrillo,* 332 U. S. 1, 7-8 (1947); *Roth* v. *United States,* 354 U. S. 476, 491, *supra*].

Of course, the words sadistic and masochistic are in common parlance. Usage of these terms, like many others which the law has borrowed for special purposes, is broad and varied. Sadism particularly has strong emotive overtones and is frequently applied to simple brutality to convey the image of leering malice. Similarly, it is today deemed sophisticated to speak of certain passive suffering as masochistic, thus implying a perverse desire of some people to receive and endure pain. But, obviously the multiple service of these words, so popular in our age of the

psychoanalytic mystique, in no degree impairs the clarity and certainty of their special use in the law. We would be compelled to revert to Latin were the common usages of English deemed to blur the particular meaning of statutory language.

"Sadistic" and "masochistic," used in the statute as types of obscenity, are subject to the same threefold constitutional test as "lewd" "filthy" or "disgusting" obscenity. Moreover, as obscenity, the portrayals of violence and torture proscribed by the statute must have some erotic element, albeit perverse. Thus the terms in question are used in an almost classic and quite limited sense. As employed, they patently exclude mere brutality or gory description, the appellant to the contrary notwithstanding. The "bloodletting in Shakespeare" is hardly the stuff of erotic stimulation. It is nothing short of absurd to assert that such incidents could conceivably be the basis of condemnation where the work "as a whole" is of such sublime quality as *King Lear* (see brief, pp. 9-10). Nor would mere description of brutality transgress customary limits of candor, which are extremely wide in this area. In addition, the designation obscene is appropraite only where pain is inflicted or endured in that peculiar, fantastic, highly stylized manner which panders to prurient interest.

Moreover, it is apparent from legislative history that the words sadistic and masochistic were incorporated into the statute in the sense of a sexual perversion, rather than as a broad proscription of ordinary brutality. The intent to utilize the pornographic connotation of the words is clearly evidenced by excerpts of testimony given at the

hearings of the Kefauver Commission and reprinted in the New York Legislative Documents as background to the legislation incorporating the terms. For instance, Dr. Karpman, the Chief Psychiatrist of St. Elizabeth's Hospital in Washington, D. C. was asked whether "these bondage, and spanking and whipping photos are pornographic in nature?" He replied, "Absolutely. They are pornographic in the sense that they stimulate the mind to abnormal sexual practices. What you speak of is what we psychiatrists know as sadism, masochism, fetishism and so on. These are abnormal sexual practices" [N. Y. Legis. Doc., vol. 3 (1956) at p. 60].

Furthermore, the *Winters* case [*Winters* v. *New York*, 333 U. S. 507 (1946)], upon which appellant relies, is quite inapposite to the present appeal. In *Winters* the Court considered a separate subdivision of Section 1141 which banned material "principally made up of criminal news, police reports, or accounts of criminal deeds, or * * * stories of deeds of bloodshed, lust or crime." Noting that the New York Court of Appeals made the statute applicable to such publications "so massed as to become vehicles for inciting violent and depraved crimes against the person * * * not necessarily * * * sexual passions" (*id.* at p. 519), the Court reasoned that "it is the massing as an incitation to crime that becomes the important element" (*id.* at p. 515). And that element was found to be unconstitutionally vague.

Specifically disturbing was the fact that the statute "does not limit punishment to the indecent and obscene, as formerly understood" (*id.* at p. 519). This conclusion was reached by both the New York Court of Appeals and this

Court partly from the fact that the proscription in question was separated in a distinct subdivision from the obscenity provisions of Section 1141, subdivision 1 [*Winters* v. *New York, id.* at p. 515; *People* v. *Winters,* 294 N. Y. 545, 550 (1946)]. Because it is a rule of statutory construction in New York, that the text should be read in conjunction with the general subject matter of the statute [*Matter of Rouss,* 221 N. Y. 81 (1917); *Matter of Kaplan* v. *Peyser,* 273 N. Y. 147 (1937)], the New York court in *Winters* found that the legislature could not have meant to duplicate subdivision 1 which deals with sexual impurity [*People* v. *Eastman,* 188 N. Y. 478 (1907); *People* v. *Winters,* at p. 550; also see, *People* v. *Muller,* 96 N. Y. 408 (1884); *Swearingen* v. *United States,* 161 U. S. 446, 451 (1896)].

The negative implication of this reasoning is clear: where the prohibition appears in the first subdivision of §1141, as it now does, it must be interpreted harmoniously with the topic—sexual debasement. Thus it is clear again that, under the provisions in question, "sadistic" and "masochistic" refer to a type of sexual perversion. Hence the infirmities of the law considered in *Winters,* which floated free of the erotic-obscene mooring, are absent here.

Furthermore, the technical meanings of the terms sadistic and masochistic further distinguish them from the crucial clause in *Winters,* for the Court found that "so massed as to incite to crime" had "no technical or common law meaning" [*Winters* v. *New York,* 333 U. S. at 519, *supra*]. It therefore constituted ineffective notice of a new crime, while the addition of the words sadistic and maso-

chistic in the present case is merely a clarification of an old one.

Undismayed by prior failures, the appellant directs the attack of vagueness against the term "obscene" itself. Necessarily, he ignores the contrary holdings of this Court as useless encumbrances to his crusade. Boldly, he parades the long standing difficulties in arriving at a meaningful verbal definition of standards. But limitations of language, with all that problem implies, does not require total abandonment of the concept. Nor does the superimposition of still another formulation substantially alter the inherent element of flexibility in the notion of obscenity. Some courts, such as the New York Court of Appeals [*People* v. *Richmond County News*, 9 N. Y. 2d 578 (1961)] and several judges, such as Mr. Justice STEWART [*Jacobellis* v. *Ohio*, 378 U. S. at p. 197, *supra*] have adopted the so-called "hard core" standard. But the adoption of this phrase obviously leaves open the question of definition. Many, like Mr. Justice STEWART, frankly acknowledge that resolution of its limits depends, in the final analysis, upon an educated subjective reaction to the particular facts and circumstances of the particular case presented.

Moreover, the "hard-core" standard does not even clarify the limits of obscenity by reducing the scope of the term, assuming logic allows elucidation in this manner. For, while it may be felt that the "hard-core" standard manifests a stricter approach than the tests announced by this Court, experience is otherwise. New York, for example, applying the hard-core test, nonetheless found Henry Miller's *Tropic of Cancer* to be obscene [*People* v. *Fritch*, 13 N. Y. 2d 577 (1964)], while this Court, applying *Roth*

later in the same year, found the same book not obscene [*Grove Press* v. *Gerstein*, 378 U. S. 577 (1964)].

Indeed, the endless exercise of formulation and reformulation of verbal standards, beyond the meaningful workable definition synthesized from the opinions of this Court, is fruitless and frustrating. Thurman Arnold observed with accuracy as well as wit that another revision of the standard would start "the futile and desperate game of definition all over again. As William James, the great psychologist, said: 'Such discussions are tedious—not as hard subjects like physics or mathematics are tedious, but as throwing feathers endlessly hour after hour is tedious' " [brief for respondent-appellant in *Vermont* v. *Verhan News Corp.* at p. 22, quoted in Kalvan, 1 Supreme Court Review of 1960, 44].

POINT III

Proscribing dissemination of obscenity is a legitimate objective of legislation.

A criminal offense occurs, under Section 1141 of the New York Penal Law, when obscene material is transferred, distributed, exhibited, "transmuted," or advertised or possessed for that purpose. The statute therefore reflects the legislative purpose to halt all dissemination of these items, while not interfering with the private possession for personal use. This is a legitimate social objective and within the sphere of proper legislative action.

Appellant, particularly through his *amici*, suggests another approach. He would proscribe only pornography

which is thrust unsought upon the beholder. He would thus allow free traffic in obscenity so long as the individual remains free to choose to avoid exposure. This suggestion, of course, tacitly acknowledges that there exists an identifiable class of material subject to some public restraint. In addition, he is not fully consistent on the nature of unavoidable promulgation. While commercial exhibition of hard-core pornographic motion pictures would presumably be allowed, he would ban "blunt scenes of lovemaking on daytime television" (brief of *amici*, p. 11). Mysteriously, he apparently regards the choice of avoidance greater for the viewer of nighttime television.

Apart from some internal weakness in the exposition, his scheme is not without merit. Certainly a community could, by legislation, ban only pornography forced indiscriminately upon all its members, including the unwilling as well as the willing perceiver. Indeed, some highly sophisticated jurisdictions, such as Denmark, seem to follow this theory.

Yet the merit of the proposal, if it be deemed meritorious, does not detract from the power of a legislative body to adopt a different view. Constitutionally, we are not concerned with the relative virtues of various programs of restraint. If the material affected is obscene, and hence beyond constitutional protection, a state or local community may elect such limitations upon display or distribution which in its judgment accord best with the needs and public sentiments of the majority of its members.

Indeed, good and sufficient reasons exist for what Mr. Justice FRANKFURTER used to call "the felt need of the

community'' to ban all dissemination of pornographic material by employing the common device of minor penal sanctions.

Whether rooted in religious concepts of purity or envigorated by pseudo-psychological notions of health, the universal repugnance to the defilement of the human body and debasement of the human passions, is a powerful fact of social existence. There is, of course, a market for the crude exploitation of degenerate lust, but the fulfillment of this demand serves no worthwhile goal. On the contrary, it is often the proper role of government to starve craven appetites. The Constitution's noble catechism no more sanctions satisfaction of the desire for pornography than it compels distribution of dope to those hungry for its poison.

Denying unhindered access to pornography is justified today not on religious grounds in the sectarian sense, nor on grounds that these materials incite to anti-social behavior. Nor do we rely wholly on the deleterious effects upon the mental health of the consumer. Rather the justification, indeed the demand for such regulation stems from considerations of community health in the larger scope of the term. Difficult to describe, and even harder to prove is the deleterious effect suffered by a community blighted by ready availability of pornography. Even the subjective experience of distaste engendered by an hour's immersion in the exhibits of this case is only the first step in understanding the social sickness produced by free distribution of such material. Yet it takes no fine sensitivity for the citizens of this community to detect neighborhoods

and stores catering to the prurient appetites. The malodorous sites might well spread if the community were deprived of such weapons as they presently have.

It is therefore no exercise in subtlety to speak of the tone of a community, nor is it beyond the province of the criminal law to aid in the improvement of that tone. In an era of rapid growth of urban centers where so many people must make their homes, this intangible quality becomes a vital factor in the health of the community. It is more closely analogous to pollution than politics, to sanitation than sanity. And the weapons of control are beneficial, the sacrifice minimal.

POINT IV

The constitutional requirement of scienter was conclusively established by the proof at the trial.

In *Smith* v. *California* [361 U. S. 147 (1959)] this Court held that a state could not impose absolute criminal liability on a bookseller by eliminating "all mental elements from the crime" [*id.* at p. 155]. Shortly thereafter, the New York Court of Appeals decided that scienter was an element of the crime described by Section 1141 [*People* v. *Finkelstein,* 9 N. Y. 2d 342 (1961)]. But while neither court decided specifically just what sort of mental element was required, it would seem clear that appellant's interpretation—that the defendant must know the material is obscene at law—is both unwarranted and incorrect.

In discussing scienter in *Smith,* the Court initially defined it as "knowledge by appellant of the contents of the book" [*id.* at p. 149], and throughout the majority opinion the word "contents" was used [*id.* at pp. 149, 153, 154]. Concurring opinions, however, use, apparently interchangeably, or in combination, the words "contents," "nature" and "character," and by expanding the significance of these last two terms appellant creates the authority for his claim.

However, in *Rosen* v. *United States* [161 U. S. 29, (1896)] this Court specifically rejected the argument now advanced by appellant. In *Rosen,* a prosecution for sending obscene literature through the mails, the defense requested a trial instruction of acquittal if a reasonable doubt existed that the defendant knew the material to be obscene. In upholding the refusal to charge in this manner the Court, speaking through former Justice HARLAN, declared:

> "The inquiry under the statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mails by one who knew or had notice at the time of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails" [161 U. S. at 41].

Later attempts to interpret scienter as requiring knowledge by the defendant of obscenity have similarly failed. The

courts consistently, and as recently as 1962, have applied the reasoning of *Rosen* to hold that knowledge or notice of the contents of the challenged work is sufficient.*

The present problem arises in part from the nature of obscenity which involves two separate questions, usually interwoven in such a way as to make the concept difficult to grapple with. Simply put, is obscenity a question of fact or of law? The element of scienter is normally established by knowledge only of the operable facts. That the wrongdoer did not know that such facts amounted to a crime at law is neither a defense nor an excuse. And in the case of pornography, there is no doubt that a purely factual element exists. For there is objectively perceivable material whose contents, subject matter, and treatment are susceptible of inspection. More specifically, a

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* *Price* v. *United States,* 165 U. S. 311 (1897); *Kahm* v. *United States,* 300 F. 2d 78, 86 (5th Cir. 1962), cert. denied 369 U. S. 859 (1962); *United States* v. *Oakley,* 290 F. 2d 517, 519 (6th Cir. 1961), cert. denied, 368 U. S. 888 (1961); *Schindler* v. *United States,* 208 F. 2d 289 (9th Cir. 1953); *People* v. *Wepplo,* 78 Cal. App. 2d 959, 178 P. 2d 853 (1947); *California* v. *Williamson,* 207 Cal. App. 2d 839, 845 (1962), cert. den. 377 U. S. 994 (1964); *Cincinnati* v. *King,* 168 N. E. 2d 633 (1960).

See also, *People* v. *Finkelstein,* 11 N. Y. 2d 300 (1962), cert. denied 371 U. S. 863 (1962); *State* v. *Hudson County News,* 41 N. J. 247, 196 A. 2d 225 (1963); *Alexander* v. *United States,* 271 F. 2d 140, 145 (8th Cir. 1959); *United States* v. *Hockman,* 277 F. 2d 631, 633 (7th Cir. 1960), cert. denied 364 U. S. 837 (1960); *Wisconsin* v. *Chobot,* 12 Wisc. 2d 110, 106 N. W. 2d 286, 292 (1960), appeal dismissed 368 U. S. 15 (1961); *California* v. *Harris,* 192 Cal. App. 2d 887, 893 (1961), rev'd on other gds., 366 P. 2d 305 (1961); *Connecticut* v. *Andrews,* 150 Conn. 103, 186 A. 2d 546, 552 (1962); *Connecticut* v. *Cercone,* 2 Conn. Cir. 144, 196 A. 2d 439, 444 (1963); *Nebraska* v. *Jungclaus,* 176 Neb. 641, 126 N. W. 2d 858, 862 (1964); *Chicago* v. *Doe,* 47 App. 2d 460, 197 N. E. 2d 711, 715 (1964); *Missouri* v. *Vollmer,* 389 S. W. 2d 20 (1965).

distributor, let alone publisher, may be expected to learn the nature of the "dominant theme." The legal significance of these facts is a far more subtle and complex issue beyond the layman's ordinary capacity, involving "a question of constitutional judgment of the most sensitive kind" [*Roth* v. *United States,* 354 U. S. at pp. 497-498, *supra*; *Jacobellis* v. *Ohio,* 378 U. S. at p. 188, *supra*]. Combining these factors, courts have characterized obscenity as a mixed question of fact and constitutional law [*People* v. *Richmond County News,* 9 N. Y. 2d 578, 580-581 (1961)].

Appellant contends, in essence, that because of the special constitutional character of "speech," his foreknowledge must cover both fact and law, and that he escapes culpability unless ne is aware that the material he deals in would be classified obscene by a court. In the absence of a prior restraint upon the particular item, this would necessarily call for an assessment of the outcome of future litigation—all but impossible for even the most trained and knowledgeable lawyers to make.

But beyond this, appellant's conclusion is a logically indefensible as well as practically unenforceable criterion of culpability. Guilt cannot depend upon the putative offender's own appraisal of the legal significance of his conduct. Else a man could acquit himself by his own belief in his innocence. To follow such a course would virtually end the control of pornography, the actual character of the material becoming quite irrelevant. Indeed, while obscenity is separated from constitutionally protected speech by a thin line, its limits require effective enforcement opportunities nonetheless. Scienter requirements

must not be so broad as to allow the line to be covered over by the amateur artist.

> "Accordingly, the proof of scienter that is required to make prosecutions for obscenity cannot be of a nature to nullify for all practical purposes the power of the State to deal with obscenity" [*Smith* v. *California*, 361 U. S. at p. 164, opinion of Justice FRANKFURTER].

Yet limiting knowledge to the facts alone may present a real dilemma for a distributor, for he may know the contents of a work, but not know it is obscene, the legal question in many instances not being easily resolved. Indeed, even after honest and good faith appraisal, he may still be liable to conviction if a court later disagrees, despite the fact that he intends to commit no crime by dissemination. Thus a man may not know he is a criminal until he is convicted, an outcome not immediately commending itself to common concepts of justice.

However, this consequence is traceable in good measure to the operation of the criminal law, which is confined to a *post facto* review of conduct. The practicalities of crime and enforcement do not lend themselves to prior advisory opinions. Consequently, a defendant is thrown upon his own resources to assess his conduct, and by choosing to act he must assume the risks if he is wrong.

> "The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree" [*Nash* v. *United States*, 229 U. S. 373, 377 (1912)].

However, in *Smith* this Court expressed concern that forcing a distributor to self-censorship might have an in-

hibitory effect on the dissemination of non-obscene material. While, as the Court also recognized, any form of criminal obscenity statute will inevitably have some such effect, the tendency to inhibit should substantially diminish as the character of the material recedes from the area of protection. Viewed in another light, this concern is actually induced by the necessarily blurred definition of obscenity at the borderline, another aspect of the issue of vagueness. In an effort to harmonize a man's before-the-fact assessment of his conduct, and the legal system's after-the-fact review, criminal statutes require "sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practice" [*Roth* v. *United States,* 354 U. S. at p. 491, *supra*]. Conversely, a statute is not void for vagueness by failing to define consequences with mathematical precision and certainty. For realistically, a residuum of doubt inevitably and unavoidably shrouds "borderline" conduct.

Realizing, however, that obscenity appraisals are extremely difficult in borderline situations, this Court left open in *Smith* the justification of honest mistake, a defense which would exculpate distributors acting in good faith [361 U. S. at p. 154]. However, an honest mistake concerning the obscenity of the material implies that the mistake must be a reasonable one. Indeed, an unreasonable belief that the law protects material is equivalent to a distributor deliberately remaining uninformed as to the facts of the material. Both approach criminal negligence, which cannot be the nexus of a scienter defense. Addressing himself to a bookseller's refusal to face the facts, Justice FRANKFURTER, concurring in *Smith,* wrote:

> "No less obviously, the Court does not hold that a bookseller who insulates himself against knowledge about an offending book is thereby free to maintain an emporium for smut" [*Smith* v. *California*, 361 U. S. at p. 161].

Indeed in the context of the present case, there is little in the opinions of this Court or of any other court which could have led Mishkin honestly to believe that his publications were not obscene. At least he must have realized that they were very close to the borderline of obscenity, and thus in a dangerous area. He could hardly have entertained a reasonable belief in his innocence. Nor did he act in good faith in disseminating the material, his intent to pander to prurience being clear. The defendant not only dictated the contents of the books, but tailored them to appeal to prurient interests. In this connection, Mishkin's instructions to his writers is conclusive evidence of his knowledge and intent to pander prurience (R. 396, 410-12, 414, 433, 434, 436-7, 446).

Furthermore, proof that Mishkin himself thought his publications were obscene can be inferred from his attempt to disguise his role in their production. The printer of the books thus was told to fabricate the name and address of the publisher and place it on the printed books, Mishkin making certain that his name or the name of any firm associated with him should not appear (R. 181-2). Obviously the appellant was thereby attempting to avoid identification by the enforcement agencies he knew would eventually seek him out.

Beyond this, knowledge of the contents and nature of the books is clearly inferable from the book jackets

which openly proclaim the material contained inside, as they depict in practically all cases the fantasy symbols of fetishism, spankings and sado-masochistic tortures. Concomitantly, the titles in most instances convey the nature of the material, titles such as *Fearful Ordeal in Restraint-land, Bound in Rubber* and *Bondage Correspondence,* for instance, denoting that these were "bondage" books. Additionally, scienter is indicated by the exorbitant prices assessed for just a few pages of poorly bound material [e.g., Exh. 1 (cardboard cover, staple bound, 50 pages for $10.00)], as well as from notations on the exhibits reminding the reader that he is enjoying "contraband" by announcing that the books were "privately printed," some in foreign countries, "for sophisticated collectors of the unusual."

Thus, the appellant knowing the contents and nature of his materials, scienter was established. And indeed, where, as here, the proof of knowledge is so strong, the burden should at least be upon the defendant to come forward to rebut the common sense presumption of scienter naturally arising, if he wishes to establish his own beliefs about the material [see A.L.I. Model Penal Code, Tent. Draft #6, §207.10 (7) (1957)].

POINT V

The exhibits were lawfully seized.

The books which formed the basis of the prosecution were obtained by the police during the course of five separate seizures, one from a warehouse, and four from book stores. The warehouse seizure on January 12, 1960, uncovered the books admitted into evidence as Exhibits 1 to 42 (R. 137-8). The seizure at the Publishers Outlet Store on December 29, 1959, netted Exhibits 43 through 67 (R. 144-7), the seizure at Midget Book Shop on the same date added Exhibit 68 (R. 151), and Exhibits 69 through 71 were seized at The Main Stem Book Store on February 10, 1960 (R. 154-5). Exhibit 72, the book *Queen Bee* which Mishkin published, was purchased by a policeman a year earlier at Publishers Outlet (R. 164-6).

Concerning the Seizure from the Warehouse

Norman Levenberg, who printed all but four of the exhibits for Mishkin (R. 193-253), also stored them for the appellant in Room 908 of the building at 37 West 20th Street, where he had his shop. The lease for the storage room was in Levenberg's name (R. 188), although Mishkin gave Levenberg $100 per month in cash to pay the rent (R. 185, 189). The maintenance of the warehouse was first entrusted to a man hired by Mishkin (R. 188), but in March, 1959, after firing the caretaker, the appellant convinced Levenberg to assume those duties, Levenberg thus obtaining control of the warehouse and its contents (R. 188-9, 279). Additionally, Levenberg would make deliv-

eries of books in the warehouse to Mishkin's stores at the appellant's request (R. 189-90), and at times shipped some of the books "out of town" at Mishkin's behest (R. 254).

In November of 1959 Mishkin informed Levenberg that the police had the warehouse under surveillance, and advised him to "stay away" (R. 187-8). But fearful because his name was on the lease, Levenberg transferred the books to the basement of the same building as soon as he could (R. 188). Further, since Mishkin told him to "get rid of everything I had" because "it was hot" (R. 275-6), Levenberg began moving the books out of the warehouse altogether, sending many of them to another place he rented in Brooklyn (R. 314).

At the same time, the police had been negotiating with Levenberg's lawyer, with Levenberg's knowledge and consent (R. 304), in order to enlist the printer's cooperation. The lawyer's presence and participation, moreover, assured that no coercion would be applied to the printer, and, indeed, Levenberg unequivocally stated, "The police never threatened me. It is a funny thing; they never threatened me" (R. 305).

Finally, on January 12, 1960, after conferring with his attorney, Levenberg made up his mind: "we decided to give the police the warehouse" (R. 302). After informing Levenberg when they intended to arrive, the police dutifully obtained a search warrant (R. 134-5), and then proceeded to the basement where the books lay, the printer coming down to meet them (R. 304). Several days later Levenberg gave cover drawings which he had kept to his attorney to give to the police (R. 272-3).

Clearly, then, Levenberg, after deciding to cooperate, consented to the police seizure of the books, and the appellant does not dispute that the consent was voluntary. The only question remaining, therefore, is whether the seizure of evidence belonging to a defendant is lawful where it is taken pursuant to the consent of an accomplice, in actual control of the material.

While this Court has left open the question of whether one in lawful possession of articles or in control of the premises in which they are found can bind a joint owner by his consent [see, *Amos* v. *United States,* 255 U. S. 313 (1920)], lower federal courts have almost unanimously held that he can.

In *Driskell* v. *United States* [281 F. 146 (9th Cir. 1922)] appellant constructed a garage on property rented to him, with the understanding that the garage was built for the use of another renter. The consent of the renter to a seizure of barrels of illicit liquor stored there was sustained by the court.

In *Curry* v. *United States* [192 F. 2d 571 (5th Cir. 1951)] the appellant paid the rent upon a dwelling for the use and occupancy of other persons. The court sustained a search and seizure of liquor pursuant to the consent of an occupant after a finding that appellant was not in possession when the search was made, nor did he occupy it as his residence, nor was he present during the search.

In *United States* v. *Sferas* [210 F. 2d 69 (9th Cir. 1954), cert. denied 347 U. S. 935 (1954)] one partner's consent to a search of a business premises was upheld against his

partner on the grounds that both had equal use and occupancy.

In *United States* v. *Antonelli Fireworks Co.* [155 F. 2d 631 (2d Cir. 1946)] the consent of an office manager of a corporation to examination of records was held to validate the search since he was in sole control of both the office and the records.

In *Gillars* v. *United States* [182 F. 2d 962 (D. C. Cir. 1950)] a search and seizure of recordings used in a treason prosecution was upheld when the records were taken from a basement in enemy territory with the consent of the custodian.

In *Reszutek* v. *United States* [147 F. 2d 142 (2d Cir. 1945)] the court held that the consent of those admittedly "in charge" of a six-family house as "superintendents" to the search of a cellar was valid against the owner.

In *United States* v. *Eldridge* [302 F. 2d 463 (4th Cir. 1962)] the search of a car with the consent of a friend who had borrowed it was deemed valid against the owner.*

Consequently, the printer Levenberg being in lawful control of both the property and the premises, his consent

* Other cases have followed the rationale's underlying this line of decisions: *United States* v. *Goodman*, 190 F. Supp. 847, 850 (N.D. Ill. 1961); *Application of Fried*, 68 F. Supp. 961 (D.C.N.Y. 1946); *Bowles* v. *Chew*, 53 F. Supp. 787 (D.C. Cal. 1944); *United States* v. *Sergio*, 21 F. Supp. 533 (D.C.N.Y. 1937); *United States* v. *Heine*, 149 F. 2d 485 (2d Cir. 1945); *Stein* v. *United States*, 166 F. 2d 851 (9th Cir. 1948); *Cutting* v. *United States*, 169 F. 2d 951 (9th Cir. 1948); *Calhoun* v. *United States*, 172 F. 2d 457 (5th Cir. 1949); *United States* v. *Walker*, 190 F. 2d 481 (2d Cir. 1951), cert. denied 342 U. S. 868 (1951).

to a search and seizure was completely valid, and the evidence procured from the premises could be used against Mishkin, the owner and publisher of the books. Indeed, appellant cites no case which contradicts this conclusion. The holdings of this Court which bar the owner of a hotel from consenting to the search of a room occupied by a guest [*Stoner* v. *California,* 376 U. S. 483 (1964); *Lustig* v. *United States,* 338 U. S. 74 (1949); *United States* v. *Jeffers,* 342 U. S. 48 (1951)], or of landlords consenting to a search of a tenant's room [*Chapman* v. *United States,* 365 U. S. 610 (1961)], moreover, are inapposite, and appellant's failure to refer to them is perhaps evidence that he realizes the distinctions. For realistically, as the Court has stressed, the innkeeper or landlord has no right of possession to the property or, while the guest or tenant is in residence, to the premises. When the guest checks out, of course, the owner of the hotel can consent to a search of the room [*Abel* v. *United States,* 362 U. S. 271 (1959)]. And indeed, where the search area is not a private premises, but a storeroom, to which both landlord and tenant have equal use, it has been held that the landlord's consent to search is valid against the tenant [*People* v. *Hicks,* 331 P. 2d 1003, 165 Cal. App. 2d 548 (1959), cert. den. 359 U. S. 981 (1959)]. In the present case the person who gave consent was the bailee of the property, having proper possession of it through the agreement of the owner, and the warehouse, paid for by Mishkin, but in the name and control of the printer, was virtually a joint business premises. In short, Levenberg's lawful possession of the books entitled him legally to turn them over to the police.

Moreover, even after Levenberg had agreed to surrender the books, the police obtained a search warrant for

the warehouse, and seized the books pursuant to its direction (R. 134-5). At the trial, Inspector Plansker testified to these facts, and the prosecutor advised the court that the warrant had ben issued by a certain magistrate on the day of the seizure (R. 134-5). Upon learning that a Lieutenant Dimler rather than the inspector had obtained the warrant, and that the prosecution anticipated calling the lieutenant as a witness, the defense counsel stated, "Well, this is all, then, subject to my examination of Lieutenant Dimler as to the adequacy of the search warrant" (R. 135-6). The lieutenant, however, was not called as a witness, but instead the prosecution and defense stipulated that, if he were called, he would testify relative to the defendant's execution of an arraignment card (Exh. 97) at the time of his arrest (R. 639).

Thus, by stipulating to Dimler's testimony, defendant waived the issue of sufficiency of the warrant. And that issue, therefore, is unavailable to him on this appeal [see, *People* v. *Friola,* 11 N. Y. 2d 157 (1962); *People* v. *Wilson,* 16 App. Div. 2d 207 (1st Dept. 1962)]. Concomitantly, the defendant has totally failed in his burden to establish that the warrant was invalid [*Batten* v. *United States,* 188 F. 2d 75 (5th Cir. 1951); *United States* v. *Rellie,* 39 F. Supp. 21 (D. C. N. Y. 1941); *United States* v. *Warraington,* 17 F. R. D. 25 (D. C. Cal. 1955)].

Concerning the Seizures at the Bookstores

The balance of the books (Exh. 43-72) were seized variously at The Publishers Outlet Store, Midget Book Shop, and The Main Stem Book Store, all premises open to the

public with shelves and rack displaying books and magazines (R. 144, 150, 153).

Police officers, of course, have the right, enjoyed by the general public, to enter shops and examine books displayed for sale. Observing articles open to view scarcely amounts to a search within the purview of the Fourth Amendment [*Hester* v. *United States,* 265 U. S. 57 (1934); *United States* v. *Lee,* 274 U. S. 559 (1927); *Ellison* v. *United States,* 206 F. 2d 476, 478 (D. C. Cir. 1953); *Fisher* v. *United States,* 205 F. 2d 703 (D. C. Cir. 1953), cert. denied, 346 U. S. 872 (1953)]. Obviously, from the nature of the books, immediately evident to the casual observer, the police at least had probable cause to believe they were obscene, and of course, knew they were intended for sale. Consequently, an arrest of the possessor on these grounds was justified, and the books, as the instrumentalities and means by which the crime was committed, as well as being contraband, became subject to seizure incident to the arrest [*Agnello* v. *United States,* 269 U. S. 20 (1925); *United States* v. *Lefkowitz,* 285 U. S. 452 (1932); *United States* v. *Rabinowitz,* 339 U. S. 56 (1950); *People* v. *Matherson,* 16 N. Y. 2d 509 (1965); *People* v. *Peskin,* 16 N. Y. 2d 511 (1965)]. In this regard, although the trial of Mishkin occurred before the decision in *Mapp* v. *Ohio* [367 U. S. 343 (1961)], and thus no motion to suppress was made, the record shows that at least two of the seizures were in fact accompanied by arrests. On December 29, 1959, at Publishers Outlet, the salesman Cosky and two others were taken into custody contemporaneously with the seizure (R. 157). On the same day, at the Midget Book Shop, the man in charge, William Schenkman, was similarly arrested at the time of the sei-

zure (R. 160). Consequently, the arrest for possession with intent to sell being valid, these incidental seizures did not violate Fourth Amendment requirements.

The third seizure, on February 10, 1960, at the Main Stem Book Store resulted in the gathering of three exhibits (Exhs. 69-71). Although the record does not show whether an arrest accompanied the collection of evidence, the seizure is nevertheless valid on other grounds. For a seizure of contraband open to view is a constitutional seizure [*United States* v. *Lee*, 274 U. S. 559 (1927); *People* v. *Cataneo*, 126 N. E. 2d 692, 6 Ill. 2d 122 (1955); *People* v. *Defore*, 242 N. Y. 13, 18 (1926); *United States* v. *Lefkowitz*, 285 U. S. 452 (1932)]. Obscene books, of course, are undoubtedly contraband [*United States* v. *Peisner*, 311 F. 2d 94, 101 (4th Cir. 1962)].

Finally, Exhibit 72 was obtained by the police a year earlier at Publishers Outlet. At that time, an officer purchased the book and arrested the seller, Herman Schenkman (R. 164, 166).* The sale thus takes the gathering of this exhibit out of the ambit of the Fourth Amendment, for the officer thereby acquired clear title to possession of the book [*People* v. *Reshes*, 39 Misc. 2d 723 (N. Y. Co. 1963)].

Appellant and *amicus* object to the seizures, however, viewing obscenity as a unique area requiring special treatment. Both draw upon language in *Marcus* v. *Search Warrants* [367 U. S. 717 (1961)] and *A Quantity of Books* v. *Kansas* [378 U. S. 205 (1964)] to argue that a judicial de-

* Schenkman was later found guilty on an obscenity charge, *People* v. *Schenkman*, 20 Misc. 2d 1093, 195 N. Y. S. 2d 570 (1960).

termination of obscenity, after adversary proceedings, is constitutionally required before publications may be seized.

But both *Marcus* and *Quantity* concern, not criminal prosecutions, but an auxiliary means of attacking obscene material—civil suppression through injunction, a form of relief approved in *Kingsley Books, Inc.* v. *Brown* [354 U. S. 436 (1957)]. Injunction statutes, however, are not always surrounded by due process safeguards automatically attending criminal prosecutions, and *Marcus* and *Quantity* are examples of civil procedures presenting problems of unconstitutional prior restraints. In *Marcus* and *Quantity,* it was the civil procedures for issuing warrants and determination of obscenity which were imperfect, and those decisions sought only to bring civil procedures up to the level of the criminal process. They did not declare that the criminal procedure was defective [*United States* v. *Peisner,* 311 F. 2d 94, *supra*].

Seizure pursuant to injunction may impinge directly on the First Amendment, whereas a seizure antecedent to a criminal prosecution is cognizable under the Fourth. For civil remedies proceed directly against a publication, the sole issue being the nature of the material. Any seizure of books to enjoin distribution, then, threatens the rights of the community to receive the material. And such seizures, prior to adversary proceedings on the question of obscenity, run the risk of assimilating non-obscene matter. But in the criminal proceeding, the issue is not suppression of books, but whether the defendant, by his conduct, has committed a crime. Probable cause that he has committed a crime serves to bring him to trial, the seizure

of publications becoming a gathering of evidence of the defendant's actions, and being purely incidental to the arrest. Thus a seizure of books for purposes of criminal trial concerns only the rights of security of the individual defendant. No issue of prior restraint against a publication is presented, for society's right to receive the material is not impaired by the detention of the defendant or the material. Indeed, aside from a possible subsidiary *in terrorem* effect of the arrest, a result not of constitutional significance [*Kingsley Books, Inc.* v. *Brown,* 354 U. S. at p. 442, *supra*], no restraint can run against the material until after a trial where all due process protections are present. Thus the penal procedure reviews conduct, which it has reason to believe is prohibited, after the event has taken place. It does not restrain expression before it occurs, the typical censorship situation. First Amendment considerations enter the criminal case only in the testing of the material at the trial.

Accordingly, the distinction in *Marcus* and *Quantity* between obscene publications and common forms of contraband such as drugs and gambling paraphernalia does not obtain in a criminal case. For in a civil proceeding, a seizure of books immediately raises First Amendment considerations of prior restraints. Seizure for prosecution, however, avoids restraints, and obscene publications then remain on the same level, and become subject to the same treatment as other contraband articles. Seizure, then, is appraised solely in terms of normal Fourth Amendment rules.

Thus, the real question concerning criminal seizures is whether, under the Fourth Amendment, a police officer may

perform an arrest or seize books by deciding himself that they are contraband or instrumentalities of a crime, since such a decision involves a complex legal determination. Indeed, in *United States* v. *Peisner* [311 F. 2d 94, *supra*] the Fourth Circuit agreed that no prior adversary hearing was required, but thought that at least one of the officers who seized the material should be familiar with the *Roth* formula. However, knowledge of *Roth*, while it obviously would not hurt, really relates to a finding of probable cause, being one factor aiding the police in determining that an offense has been committed. And probable cause, the recognized foundation upon which an arrest may lawfully be performed, is the determination entrusted to the police.

It is, of course, axiomatic that probable cause need not be sufficient to convict [e.g., *Brinegar* v. *United States*, 338 U. S. 160 (1949); *Carrol* v. *United States*, 267 U. S. 132 (1925)], and thus the validity of the arrest or seizure does not hinge on the legal result of the trial. In terms of obscenity prosecutions, the seizure turns on the facts and circumstances within the officer's knowledge, as it does in any other Fourth Amendment review, and not upon the subsequent legal evaluation of those facts. Consequently, the judgment required of an arresting officer is not nearly as complex as the ultimate finding. He does not have to decide that the material is actually obscene. Indeed, the police are constantly faced with similar decisions in other fields of law enforcement. For instance, a narcotics arrest or seizure is commonly made upon discovery of a glassine envelope containing a white powder, since an officer may reasonably believe the powder to be heroin. However, that it is in fact heroin cannot be determined until later testing.

Similarly, the reasonable belief that material is obscene, culled from the superficial appearance and contents of the material, is sufficient to validate an arrest or seizure.

Thus, there being no question that the criminal procedure can be invoked to convict a defendant for disseminating obscene books [*Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, *supra; Roth* v. *United States*, 354 U. S. 476, *supra*], there should then be no question that the normal channels of the criminal process can be applied to implement prosecution. Accordingly, if there is probable cause for arrest, evidence of crime may be seized without a warrant incident to that arrest, as it may in any criminal case, and contraband, open to view, is subject to seizure, limited only by the rule of reason [*People* v. *Matherson*, 16 N. Y. 2d 509, *supra*]. There was no abuse of such just procedure in obtaining the evidence in the instant case. Nor was any prior determination of obscenity requisite to the commencement of a criminal action.

Conclusion

The judgment below should be affirmed.

Respectfully submitted,

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